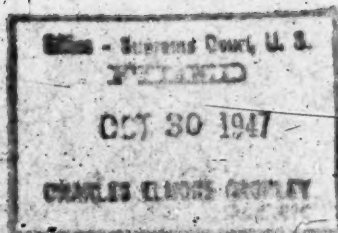


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No. 13



In the Supreme Court of the United States

OCTOBER TERM, 1947

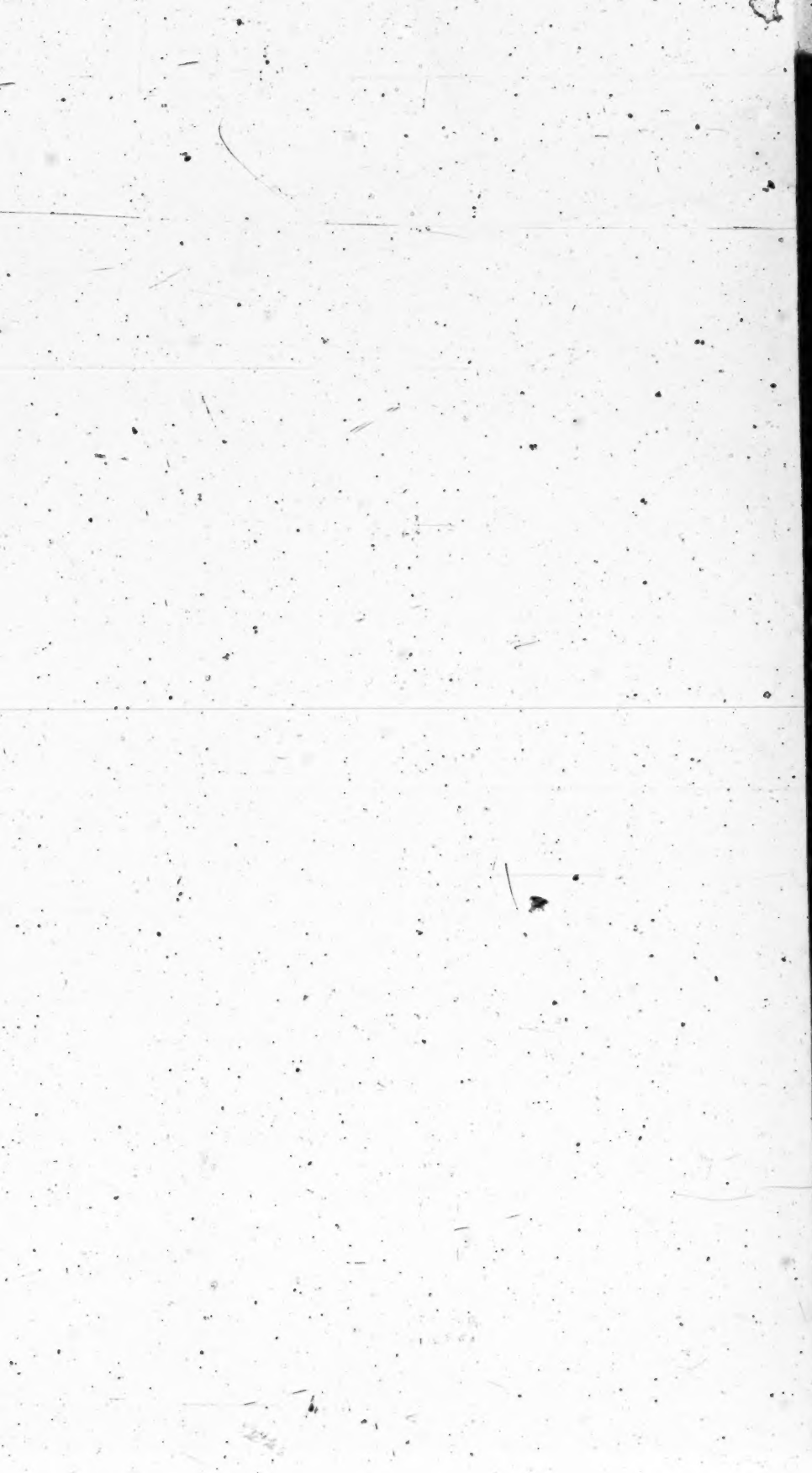
THE UNITED STATES OF AMERICA, APPELLANT

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES



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ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court on appellees' motion to dismiss the complaint (R. 3933-4131) is reported in 67 F. Supp. 397. Its opinion on appellees' motion to strike paragraph 46 (a) of the complaint, the paragraph alleging the invalid-

ity of certain patents, or, in the alternative, for partial judgment dismissing that part of the Government's claim therein contained (R. 369-395), is reported in 53 F. Supp. 889.

JURISDICTION

The judgment of the district court was entered on August 5, 1946 (R. 4169). The petition for appeal was filed on September 30, 1946, and was allowed the same day (R. 4187-4188). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823, 36 Stat. 1167, 15 U. S. C. 29), and Section 238 of the Judicial Code, as amended (36 Stat. 1157, 38 Stat. 804, 43 Stat. 938, 28 U. S. C. 345). Probable jurisdiction was noted on December 16, 1946 (R. 4204).

QUESTIONS PRESENTED

1. Whether a combination among appellees, who together comprise all manufacturers of gypsum board, to organize the gypsum industry and stabilize prices by entering into patent license agreements containing price-fixing provisions with USG, the owner of certain patents and the dominant manufacturer in the industry, constitutes a conspiracy to restrain and to monopolize trade and commerce in violation of the Sherman Act; and whether the evidence, properly considered, establishes the existence of such a combination among the appellees.

2. Whether the owner of process or narrow improvement patents may condition a license to use the patented process or to make, use, and vend the patented product upon the condition that the licensee not sell the unpatented product produced by the patented process or the product to which the narrow improvement patent relates at less than the minimum prices established from time to time by the patentee.

3. Whether the prices and conditions of sale which appellees have imposed upon trade and commerce in gypsum board and related products are normally and reasonably adapted to the securing of a pecuniary reward for the patentee's monopoly.

4. Whether the holding in *United States v. General Electric Co.*, 272 U. S. 476, which permitted a patentee to condition a license to make, use, and vend the patented product on the requirement that the licensee sell the patented product by the method and at the prices fixed by the patentee should now be overruled.

5. Whether the Government in a proceeding instituted under Section 4 of the Sherman Act to prevent and restrain violations of the Act may show the violation of the Act by proving the invalidity of patents relied upon to justify the restraint and monopolization of trade and commerce.

6. Whether under the rule of *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 249, the declara-

tions of one person are admissible in evidence against and binding upon other persons when it has been shown by evidence *aliunde* that they are associated together in a combination lawful or unlawful.

7. Whether documents admitted to be genuine under Rule 36 F. R. Civ. P. which contain declarations in furtherance of a conspiracy are binding upon the non-admitting appellees.

8. Whether the Government in a proceeding under Section 4 of the Sherman Act to prevent and restrain a price-fixing combination establishes a *prima facie* violation of that Act by showing the existence of a combination among all the competitors in the industry to fix the prices and terms of sale of a patented product or whether, in addition, it is required to negative a defense based upon the ownership of patents.

STATUTE INVOLVED

The Act of July 2, 1890, 26 Stat. 209 (15 U. S. C. 1, 2, 4), known as the Sherman Act, provides in part as follows:

SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the

trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

* * * * *

SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

STATEMENT

This is a civil action instituted by the United States in 1940 under Section 4 of the Sherman Act to enjoin and restrain violations of Sections 1, 2, and 3 of that Act. The complaint, as amended, charges the appellees with combining and conspiring to fix arbitrary and noncompetitive prices for gypsum board; to standardize gypsum board and its method of production for the purpose of eliminating competition; to raise and stabilize prices for plaster and miscellaneous gypsum products; to control the distribution of gypsum board and eliminate jobbers, and to control the resale price of manufacturing distribu-

tors of gypsum board (R. 1, 9-10). The case was tried before a three-judge district court constituted in 1942 pursuant to an expediting certificate filed under the Expediting Act of February 11, 1903, as amended (R. 304). In advance of trial the court ruled that the Government was not entitled to show the invalidity of patents pursuant to which the defendants had fixed prices and imposed various other restraints (R. 369, 396).

Trial began in November 1943 and the Government closed its case on April 20, 1944. The evidence introduced by the Government consisted of about 650 documents and the testimony of 28 witnesses, 21 of whom were, or had been, officers or employees of companies alleged to be parties to the conspiracy. Many of the documents consisted of contemporaneous letters or memoranda written by these 21 witnesses. After the Government had rested the defendants each moved to strike from the record all the exhibits and testimony which were received as to each defendant subject to the usual reservation with respect to the declarations of alleged co-conspirators (R. 3891); also to dismiss the case under Rule 41 (b) of the Rules of Civil Procedure upon the ground that upon the facts and the law plaintiff had shown no right to relief (R. 3901).

On June 15, 1946, the court rendered an opinion (R. 3933-4131) holding that the motions should

be granted and, on August 5, 1946, filed its findings of fact and conclusions of law and entered judgment dismissing the complaint (R. 4169). The district court in entering judgment made the following rulings:

1. Association of defendants in a common plan to organize the industry and stabilize prices under like price-fixing patent licensing contracts would not be illegal. In addition, the evidence shows that there was no such plan.

2. Defendants did not have the burden of establishing that their price fixing was justified by their patent rights; the Government had the burden of establishing the contrary:

3. The defendants' licensing agreements and their practices thereunder cannot be distinguished from those held to be valid in *United States v. General Electric Co.*, 272 U. S. 476.

4. The declarations of one defendant were inadmissible against other defendants because there was no independent evidence to establish the unlawful conspiracy.

5. Apart from these declarations by defendants, there was no evidence that the license agreements were "*nonbona fide*" in character or purpose; therefore each prior declaration by a defendant which was put in evidence was evidence only against him and was not admissible against any of his alleged co-conspirators.

6. The evidence, considered on the foregoing basis, does not establish that the license agree-

ments were "sham", i. e., not intended to bind the parties to the promises made,¹ or that they were designed to achieve restraints of trade beyond the proper limits of USG's patent rights.

7. The defendants in their actual operations under the license agreements did not exceed the proper limits of rights given by patent law.

8. On the defendants' motions to dismiss pursuant to Rule 41 (b) of the Rules of Civil Procedure, every factual issue as to which the evidence before the court did not preponderate in favor of the plaintiff must be resolved against the plaintiff.

The assignment of errors challenges each of these rulings, certain of the findings of fact and conclusions of law, and certain other holdings or rulings of the court made in course of trial, as well as the ruling made in advance of trial, that the Government was not entitled to show the invalidity of the patents on which the defendants rely.

The evidence upon which the Government relies consists in the main of contemporaneous documents and of the uncontradicted testimony of unimpeached witnesses. On a number of important matters the findings of the court below are, in our view, inconsistent with such evidence. The Court will not appreciate how clearly erroneous

¹The Government had never contended that the license agreements were sham in this sense.

those findings are unless it actually reads many of the documents and some of the testimony. Accordingly, in order to facilitate the Court's consideration of the case and in the interest of ultimate brevity we are setting forth the documented facts in some detail in this Statement. Particular findings claimed to be erroneous are discussed in footnotes at an appropriate point in the narrative Statement. The unusual length of the Statement is, we believe, required by the nature and magnitude of the case.

I

THE APPELLEES

The appellee companies are engaged in the mining and production of gypsum and in the manufacture of gypsum products, principally gypsum board² and gypsum plaster (Fdg. 3, R. 4133). Each sells gypsum products in interstate commerce to distributors and consumers within the so-called Eastern area which includes the states east of the Rocky Mountains (Fdg. 3, R. 4133). The appellees combined manufacture 100% of the gypsum board and a substantial percentage of the plaster sold in the Eastern area (Fdg. 21, R. 4144).

United States Gypsum Company (USG) was incorporated in 1901 to effect a merger of 35

² Gypsum board or board is used to refer to gypsum plasterboard, gypsum lath, and gypsum wallboard.

producers, processors and distributors of gypsum products. During the last twenty years it has acquired the gypsum plants of eight additional producers including the Niagara Gypsum Company (Niagara). USG now operates 16 plants in the Eastern area, at 13 of which board is produced. Since its organization in 1901 it has been the largest producer of gypsum board and plaster in the United States. In 1939 it produced and sold approximately 55% of all the gypsum board and a substantial amount of all plaster sold in the Eastern area. In that year its sales in the Eastern area of gypsum board amounted to approximately \$10,600,000. Appellee Sewell L. Avery was president of USG from 1920 to 1936 and since that time has been chairman of its board of directors. The appellee Oliver M. Knode is president of USG. (R. 3, 6, 162, 264, 270.)

National Gypsum Company (National) was incorporated in 1925 and commenced production of gypsum board and plaster in 1926. In 1935 it acquired Universal Gypsum and Lime Company (Universal) and in 1936 the Atlantic Gypsum Products Corporation (Atlantic). National, now the second largest producer of gypsum board in the United States, operates ten plants in the Eastern area, eight of which produce gypsum board. In 1939 it produced approximately 23% of all gypsum board and 20% of all plaster manu-

factured and sold in the Eastern area. In that year its sales in the Eastern area of gypsum board amounted to approximately \$4,500,000. Appellee Melvin H. Baker is president of National. (R. 3, 7, 162, 215, 217.)

Certain-teed Products Corporation (Certain-teed) entered the gypsum industry in 1923 by acquiring the six gypsum plants of the Acme Cement Plaster Company, but did not commence manufacturing gypsum board until 1926. In 1928 it acquired the Beaver Products Company, Inc., and the Beaver Board Company (both sometimes referred to as Beaver), then the second largest producer of gypsum board. Beaver had entered the gypsum industry in 1920 by the purchase of the American Cement Plaster Company and Best-wall Manufacturing Company (Bestwall). Certain-teed now operates five plants, four of which produce gypsum board, and is the third largest producer of gypsum products in the United States. In 1939 it produced approximately 11% of all gypsum board and 10% of all plaster manufactured and sold in the Eastern area. In that year sales of Certain-teed in the Eastern area of gypsum board amounted to \$2,100,000. Appellee Henry J. Hartley is president of Certain-teed. (R. 3, 7, 162, 230, 235.)

The Celotex Corporation (Celotex), the largest producer of fiber insulating board in the United States, entered the gypsum industry by acquiring

ing the American Gypsum Company (American) in 1939. In 1939 sales by Celotex in the Eastern area of gypsum board amounted to approximately \$585,000. (R. 7, 162, 195.)

Ebsary Gypsum Company, Inc. (Ebsary) has been engaged in the manufacture of plaster since 1918, and gypsum board since 1928. Its sales of gypsum board in the Eastern area in 1939 amounted to approximately \$670,000. Appellee Frederick G. Ebsary is president of Ebsary. (R. 8, 162, 164.)

Newark Plaster Company (Newark) has been engaged in the production of plaster since 1922 and the manufacture of gypsum board since 1937 when it acquired the Kelley Plasterboard Company, Inc., which had been engaged in the production of board since before 1918. Newark's sales in the Eastern area of gypsum board amounted to approximately \$750,000 in 1939. Appellee Frederick Tomkins is president of Newark. (R. 8, 162, 298.)

Appellee Samuel M. Gloyd is the sole owner of an unincorporated business trading under the name of Texas Cement Plaster Company (Texas). It has been manufacturing plaster since about 1902 and gypsum board since 1924. Its sales in the Eastern area of gypsum board amounted to approximately \$230,000 in 1939. (R. 8, 162, 176.)

II

THE GYPSUM INDUSTRY

Gypsum is a rocklike mineral composed of calcium sulphate in combination with water and is found in deposits in numerous states of the United States and in Canada. After it is mined it is crushed and subjected to a process known as calcination to evaporate part of its water content. The resulting product known as calcined gypsum or stucco has the characteristics of readily recombining with water to form a hard, rigid mass. Calcined gypsum is the primary constituent of various important products used in the construction industry. (Fdg. 4, R. 4133.) Its principal products are gypsum board and plaster. In addition, there are several less important products such as gypsum block and tile. In 1939 the sales value of all products of calcined gypsum used in the building industry in the United States amounted to \$42,000,000, \$23,000,000 of which was accounted for by gypsum board and \$17,000,000 by plaster.

Until about the year 1900 lime was the principal ingredient of all wall plaster. About 1900, however, gypsum became commercially important as an ingredient of plaster in place of lime. Since that time, gypsum has gradually displaced lime in plaster, and over 90% of all plaster now used in building construction in the United States is made with gypsum.

The basic patents on gypsum board have long since expired. Commercial production of gypsum board commenced about 1905. For many years thereafter, by far the greatest amount of gypsum board produced was board designed to be used as a base for plaster in wall and ceiling structures and known as plasterboard. About 1925, a board smaller than plasterboard, known as gypsum lath, was introduced on the market as a plaster support. By reason of the smaller and, therefore, more convenient size of gypsum lath, it has displaced plasterboard in new construction, and plasterboard is now used solely for repair work. Today gypsum lath is usually $\frac{3}{8}$ or $\frac{1}{2}$ inch in thickness, 16 inches wide, and it is either 32, 36, or 48 inches long. The sales value of gypsum lath and plasterboard manufactured by the appellee companies and sold in the United States in 1939 was about \$13,000,000.

Several years after the first commercial manufacture of plasterboard, a gypsum board, known as wallboard and designed to be used as a finished panel in place of plaster and lath, was introduced on the market. Gypsum wallboard is now one of the most important of various boards on the market which are used as substitutes for plaster and lath. Today wallboard is either $\frac{1}{4}$, $\frac{3}{8}$, or $\frac{1}{2}$ inch in thickness, 32, 36, or 48 inches wide, and comes in various lengths from 4 to 12 feet long. The sales value of gypsum wallboard manufac-

tured by the appellees and sold in the United States in 1939 was about \$8,500,000.

All gypsum board consists of a flat, thin core of hardened calcined gypsum covered on both surfaces with heavy paper, known as liners. Since gypsum lath and plasterboard are intended to support plaster, the paper liners with which the surfaces of the gypsum core are covered are coarse. Because gypsum wallboard is a substitute for both plaster and lath, and is therefore not covered with plaster, one of its liners consists of a good grade of heavy, smooth paper.

In the early period of its manufacture, gypsum board was crudely made by pouring buckets of calcined gypsum mixed with water in thin layers between two pieces of rough felt paper, smoothing the product with rollers, hardening it on racks and trimming the pieces to size (Fdg. 5, R. 4133). For many years—at least since 1920—board and lath have been made by depositing the wet gypsum or gypsum slurry on a continuous sheet of paper that unrolls and moves along on a belt or conveyor some several hundred feet in length. After the slurry is placed on the lower sheet of paper it is mechanically spread substantially even over it; the top sheet of paper then unrolls and is pressed down on the slurry as it passes under rollers. At the end of the conveyor the board is cut to size and placed in dryers from which it comes out as a finished product in about

thirty minutes. (R. 476-477.) Perforated lath is made by punching holes in lath made in this manner. Metallized board has a paper-thin thickness of metallic foil attached to one surface of ordinary board or lath.

III

THE CONSPIRACY

A. *The conspiracy in 1925-1926*

Prior to 1912 the edges of the core of all gypsum board were exposed. About 1912 USG commenced the manufacture of a gypsum board with the side edges bound and sealed by folding the lower paper liner over the edges of the core. The end edges of the board continued to be exposed as before. This improvement was covered by United States letters patent Number 1,034,746 issued August 6, 1912, upon the application of Clarence W. Utzman, and assigned by him to USG. The board embodying the edges described in the Utzman patent was known as a closed-edge board as distinguished from board with an unprotected edge which was known as open-edge board. The closed-edge board represented an improvement over the open-edge board then on the market since it reduced breakage in shipment and crumbling of the core at the side edges when being nailed into place.

Prior to 1917 the Bestwall Manufacturing Company (Bestwall) commenced the manufacture of

a closed-edge type of board. In July of that year, USG filed suit against Bestwall and in July 1919 obtained a judgment holding the Utzman patent valid and infringed. This judgment was affirmed by the Circuit Court of Appeals for the Seventh Circuit on January 4, 1921 (Fdg. 6, R. 4134). During the course of this litigation Bestwall had been acquired by Beaver, which then became the second largest manufacturer of gypsum board in the United States, and both were manufacturing a board with semi-closed edges. By a supplemental bill USG sued both of these companies for infringement and again prevailed. Beaver appealed to the Circuit Court of Appeals for the Seventh Circuit.

Blagden, who had become president of Beaver in 1923, made overtures of compromise and settlement of this litigation to Avery, both before and after the decision of the trial court (R. 784-785). At a meeting of Blagden and Avery on December 10, 1925, Avery specified as terms of settlement the payment of damages by Beaver for infringement of USG's patents; acknowledgment by Beaver of the validity of USG's patents; payment of royalties; and the right in USG to fix prices on board made and sold by Beaver under the Utzman closed-edge patent (R. 785-790).

On December 12, 1925, immediately following this conference, Blagden wrote Avery that, as he had previously informed Avery, he, Blagden, and

his attorney "have been working up a memorandum in which we have attempted to analyze the results of all possible decisions by the Circuit Court of Appeals of the matters in controversy and contrasted such results with a compromise and adjustment of the suit along the lines I have discussed with you," and stated that he was enclosing a copy of the memorandum. His letter concluded that, "a settlement along the lines discussed by us would be more advantageous than any possible decision by the Circuit Court of Appeals" (Ex. 184, R. 5337).³

The memorandum, Exhibit 185 (R. 5338-5347),⁴ accurately forecast what was to happen in the gypsum board industry in the next several years. In this memorandum, Blagden pointed out the various possible judicial decisions as to the status of the Utzman patent. With respect to each, Blagden stated in some detail what the normal result of such a decision would be, and under each concluded with the significant statement that, in such case:

Plaintiff [USG] would lose irrevocably its present opportunity to organize the industry and stabilize prices.

³ Since the only exhibits referred to in this brief are those introduced by the Government, they are designated as "Ex. —" instead of as "Gov't. Ex. —."

⁴ This letter (Ex. 184, R. 5337) together with the memorandum enclosed therewith (Ex. 185, R. 5338) was obtained from the files of USG. Blagden, called as a witness, identified the two exhibits, and his testimony on cross-examination in nowise weakened their force (R. 871).

Blagden then went on to contrast the enumerated results with the results that would follow if the suit were compromised and settled. He pointed out that if the suit were settled:

1. Defendant [Beaver] would acknowledge validity of Utzman patents.

2. Defendant [Beaver] * * * would agree to pay plaintiff [USG] a reasonable royalty * * *

3. Defendant [Beaver] would agree to use its best endeavors to induce manufacturers of closed-edge wallboard * * * to accept licenses * * *

4. Such recognition of and acquiescence in plaintiff's [USG's] patents would enable plaintiff to maintain a lawful price control and avoid the necessity of reduction by plaintiff of current prices to meet competition * * *

7. Plaintiff [USG] would be able to take a dominating position in the industry with an opportunity to control or at least participate in the control of prices through legitimate means of patent licenses (R. 5346-5347).⁵

⁵ The trial court in its opinion summarized Exhibit 185, R. 5338, by saying merely that Blagden had suggested a settlement and license enabling USG to maintain "a lawful price control" through the "legitimate means of patent licenses," Blagden to endeavor to induce other manufacturers to accept licenses and permit USG to take a "dominating position." It will be noted that the court took the phrase "lawful price control" from paragraph 4, quoted above, but omitted the rest of the sentence, which reads, "and avoid the necessity of reduction by plaintiff [USG] of current prices to

On May 12, 1926, Frank J. Griswold, general manager of American, wrote J. H. McCrady, president of American, that (Ex. 104, R. 5260):

I just returned from a meeting at Buffalo yesterday with Mr. Blagden, President of Beaver Products Company. He has had one or two interviews with Avery on the matter of settling all disputes and litigations between the wall board manufacturers by entering into a licensing arrangement and the thing looks very favorable.* We are standing on 50¢ per M

meet competition. * * * (R. 4102). The omission destroys the intent and purpose of the sentence.

An even more substantial omission on the part of the trial court is its failure through an extended opinion to make any reference whatever to Blagden's main proposition that, unless USG should settle with Beaver and grant industry-wide licenses with price fixing, it *"would lose irrevocably its present opportunity to organize the industry and stabilize prices."* [Italics supplied.] The court's complete failure to attach any significance to this phrase was clearly erroneous.

* The court below stated that "Blagden testified that he did not discuss with Avery the matter of all companies settling disputes and taking licenses" (R. 4110). The record shows, however, that when Blagden was questioned concerning the meetings referred to in the second sentence of Ex. 104, he testified: "I only remember having interviews with him on discussing our own settlement. I remember that we had two or three meetings, several meetings in Chicago on other subjects, and naturally at some of them there we would discuss the board question" (R. 500). Following this the Presiding Justice asked: "Do you remember discussions on that broad a subject?", to which Blagden answered: "No, sir" (R. 801). It is evident that Blagden did not deny that he had had the discussions referred to with Avery, as the court stated, but at most that he could not remember events occurring 17 years

royalty. Avery is talking about \$1.00 per M and I am inclined to think he will probably stand pretty firm on this price. However, on his own admission he has so much at stake on the proposition that he may change his views.

This matter will be discussed by all independent wallboard manufacturers at a meeting in Chicago, next Wednesday afternoon and probably some definite action taken on it as the probabilities are that Avery may meet with us at that meeting

* * *. *According to the plans we have we figure that there is a possibility of us holding the price steady on wallboard for the next fourteen or fifteen years which means much to the industry.**

The meeting referred to by Griswold was held as scheduled in Chicago on Wednesday, May 19, 1926, and was attended by Avery, Blagden, Griswold, and representatives of every board manu-

previously; hence the force of the contemporaneously written Exhibit 104 is in no way impaired. The finding to the contrary is obviously without support. There is no doubt at all on the essential point that Blagden did talk with all members of the industry.

* Except as otherwise indicated, all italics are supplied.

* Griswold testified that when he wrote in Exhibit 104 of the plans for holding prices steady on wallboard for "the next fourteen or fifteen years" he was under the impression that the life of a patent was 20 years and that USG would base price control on the Birdsey patent, rather than the Utzman patent (R. 700). There is no question from Griswold's testimony that the plan he had in mind was to obtain price stabilization by means of patent licenses (R. 570-571, 576).

facturer except Texas and National (R. 240-241, 278, 520, 833-834). The subject of the conference was the licensing of those present (R. 278, 240-241). USG claims that the conference was concerned solely with "the possibility of the settlement of all outstanding litigation between * * * USG, and other manufacturers of gypsum board" (R. 278), but it is significant that Certain-teed, which was represented, was not then even manufacturing board, although it contemplated doing so.

In the succeeding months of June and July 1926, Blagden had further conferences with representatives of USG (R. 808). During these conferences Blagden offered to transfer to USG all the patents that Beaver had in any way relating to the manufacture of gypsum board. Blagden testified that the Beaver and USG patents on the closed-edge type of board were practically all the patents there were on this type of edge. Blagden pointed out to Avery that by combining the 30 or more Beaver patents and applications with those of USG, USG would be in a better position to come to an agreement with the other manufacturers (R. 790-797). USG accepted the offer of Blagden and the patents were in fact transferred to USG on July 29, 1926. On the same day Beaver and USG settled their litigation and USG granted Beaver a license (R. 39). About six weeks later Universal and USG also settled their patent infringement suit, and on

September 17, 1926, Universal, too, became a licensee of USG (Ex. 2, R. 4226). Both of the above license agreements were substantially identical and among other things provided that:

(a) USG licenses Beaver and Universal to use inventions covered by the Utzman patent, 29 other patents, and 38 applications for patents, in manufacturing gypsum board, until the expiration of the Utzman machine patent on February 10, 1937. These patents and applications included those transferred to USG by Beaver.

(b) USG reserved the right to determine and fix, during the life of the Utzman closed-edge patent, or until August 6, 1929, the price at which the licensees sold closed-edge board.

(c) The licensees agreed to pay specified royalties on all board manufactured by them, whether patented or unpatented, until February 10, 1937.

(d) The licensees agreed to admit that all board having a protected edge fell within the scope of the Utzman patent, during the life of that patent, and that, after its expiration, all board having a protected edge was made under the machine patent or under other patents covered by the license agreements.

(e) The licensees acknowledged, and agreed not to contest, the validity of all patents covered in the license agreements and of all patents subsequently issued on applications covered in the agreements.

After the execution of the Beaver-USG license agreement, Blagden continued his efforts to induce other manufacturers of board to become licensees, as he stated he would do in Exhibit 185. He testified that he had conversations with Brown of Certain-teed (R. 831), Haggerty of National (R. 862), Fuller of Atlantic (R. 862), Gloyd of Texas (R. 862), Ebsary of Ebsary (R. 861), and Shearer of Universal (R. 827). He also testified that he "undoubtedly talked to some others" (R. 863). He recalled the subject matter of these conversations as follows (R. 862):

Whenever I met with these gentlemen they would ask me were we going to take out a license, or had we taken out a license with U. S. Gypsum, and I would tell them that we had, and if they would ask me, "Well, what do you think about it?" I would say, "I would advise you to join up."

On October 1, 1926, Blagden wrote Avery and, referring to the Beaver-USG license agreements, stated (Ex. 189, R. 5349):

I feel that the "entente cordial" that has started between our companies is only a beginner and that if we play the game right it should bring about big things.

When Blagden was asked what he meant by this statement, he answered (R. 864-865):

I said in my previous testimony—stability, and I meant by that that in addition to our taking out a license, that undoubt-

edly others would take out licenses and that would tend toward stability.

Q. And by "stability", what do you mean, sir?

A. Stabilizing the prices in the industry.*

After the industries meeting in Chicago in May 1926, Griswold began to play a more active part, his goal also being industry-wide participation in the licensing arrangement in order to eliminate litigation in the industry and to stabilize prices (R. 5285; 663-664; 574).¹⁰ On June 2, 1926, Griswold wrote Avery that he had met with Haggerty of National, which had not been represented at the Chicago meeting, and given him the details of that meeting, and stated that when he left,

* The court below in its discussion of Exhibit 189 (R. 4111), referred only to that part of Blagden's testimony where he said he meant by "entente cordial" that "our bickering and squabbling and fighting was over" (R. 837-838). The court also said that by "if we play the game right," Blagden meant "only living up to the license agreement. * * *" (R. 4111). Cf. R. 864-865. The court made no reference whatever to Blagden's later explicit statement, above quoted, that he also meant "Stabilizing the prices in the industry." Blagden was not impeached as a witness; nor was his testimony inconsistent or contradicted in any way. The court's failure to consider Blagden's entire testimony, therefore, gravely impugns the accuracy of the court's treatment of the evidence on this point.

¹⁰ On January 1927, Griswold wrote Avery (Ex. 132, R. 5285):

"You will remember that I started out to deliver 100 percent of the manufacturers of board that would be willing to sign up on a license arrangement with your company which at that time only extended during the life of the Utzman

Haggerty "admitted being personally sold on the proposition." He also wrote that he would like to receive two copies of the Beaver contract when it was drafted because he wanted to forward one to the Texas Cement Plaster Company with any comments he desired to make on it. He concluded that, "It would be very nice if this matter could come up at the next meeting of the Industries, which is on July 13th and 14th" (Ex. 106, R. 5262)."

Avery, in acknowledging the letter, thanked Griswold for the information it contained and stated that, "I shall be pleased to send you the two copies of the contract you suggest as soon as it is drawn * * *. It seems reasonable to me that the contract should take form in plenty of

patents and at a meeting that was held all of the manufacturers seemed to feel favorable to the matter. * * *"

On cross-examination Griswold testified that he was not asked by Avery to contact other manufacturers and that he had no "agreement" with Avery to do so and that he was not an "agent" of Avery's (R. 716, 691). However, as will appear, Avery knew of and approved of Griswold's activities. Moreover, in answer to a question propounded by the court as to what Avery said about industry-wide licenses, Griswold testified, "Well, as I remember, it was that he insisted at that time, or stated that he wanted them all to come in, * * *" (R. 620). This was uncontradicted testimony of an unimpeached witness.

"Griswold testified that Texas, which had either just entered or was proposing to enter the board business, knew of the suit against Beaver, and he wanted to show Texas "what had been done, if there had been anything, in the way of a settlement, or a proposed settlement, so that if he wanted to do likewise he could do so" (R. 545).

time for the consideration of those interested when they are here at the Industries meeting on the thirteenth and fourteenth" (Ex. 107, R. 5263).

On August 17, 1926, Griswold wrote Avery, "Do not think I am not working on the matter about which we have had some correspondence," and added that he was to see Haggerty of National and possibly Mr. Brown of Certain-feed Products shortly, and would report to Avery thereafter (Ex. 112, R. 5268). On August 31, 1926, Griswold reported to Avery that he had had an interview with Haggerty and also had met Fuller of Atlantic which proposed to enter the industry, adding (Ex. 113, R. 5269), "Had a very pleasant talk with him along the lines we are working on and expect another interview with him in the very near future." This interview with Fuller and Channing of Atlantic Gypsum took place early in October. Griswold wrote Avery (Ex. 121, R. 5276), "I have talked very earnestly to them on the matter of the licensing agreement and believe they will consider it favorably."¹² He also requested a copy of the license contract to forward

¹² Griswold testified that he had advised Atlantic to make a closed type edge, providing "they could reach an agreement with Mr. Avery," but that he had done nothing after October 1926 until Atlantic signed up "by way of inducing or attempting to induce either Atlantic or USG to enter into a contract with one another" (R. 712, 713). The trial court's inference from this evidence (R. 4038) that Griswold had nothing of importance to do with bringing Atlantic into the combination ignores his testimony as to his activities prior to October 1926.

to Fuller and Channing (Ex. 121). Avery sent Griswold a copy of the license for Fuller and Channing stating, "If you believe it advisable to forward it on to them I would be pleased to have you do it" (Ex. 122, R. 5277).

Griswold acknowledged the letter on October 15, 1926, stating he was of the opinion that it would be a wise move to forward the contract to Fuller with a request that the matter be kept confidential. He added, "I might advise you that the Directors of this Company had a meeting Monday of this week, and the License Agreement matter was referred back to a Committee. This Committee expects to meet with all other manufacturers of board who have not yet signed the License Agreement. The meeting will probably be Thursday of this coming week *with the object in view of getting united action on this matter*" (Ex. 123, R. 5278). In reply Avery wrote Griswold on October 19, 1926 (Ex. 124, R. 5279):

I am glad to have the information this contains, and will be interested in hearing from you after the meeting that you expect to have with all other manufacturers of the board who have not so far signed the license agreement.¹³ Regardless of the outcome of your efforts in this particular, I

¹³ Avery's reply to Ex. 124 makes it clear beyond doubt that Griswold used the phrase "united action" with reference to the license arrangement, and not to his proposed merger to be discussed later.

want to assure you of my appreciation not only of your interest but of the broad-visioned manner with which you have proceeded with this important subject.

On the same day Avery also wrote Blagden of the proposed meeting and added, "While I will admit to being a little disappointed in the loss of time on this matter, I do fully appreciate the very intelligent treatment that Mr. Griswold gives to this subject, and have confidence that his plans will be wise and influential. *I do not know whether you expect to be a part of this meeting, but I hope so*" (Ex. 191, R. 5351). Avery's letter was written less than three weeks after Blagden had written Avery about the "entente cordial" in the industry (Ex. 189, R. 5349).

Subsequently Griswold regretfully advised Avery that as some of the people interested could not be present at the selected time the group meeting would have to be postponed until after the first of November 1926. He assured Avery that "All of them have expressed the desire to come as soon as they can arrange their affairs to do so" and added that Atlantic "is very much interested" (Ex. 125, R. 5280). He also added:

I am quite sure you appreciate what I have to contend with and also appreciate the fact that if the original plan should fail of unanimous consent of all of the manufacturers, and if the other deal about which you are familiar should materialize,

it would still leave the way open to bring the matter to a head in a much easier way. I am quite sure that one or the other will succeed by patient and persistent work.¹⁴

The combined efforts of Griswold and Blagden were unsuccessful. On November 16, 1926, Griswold wrote Avery (Ex. 128, R. 5282):

After spending considerable time with the manufacturers of Wall and Plaster Board, discussing the proposed license agreement submitted by your company, I am now compelled to admit that further efforts would simply be a waste of time and that it would be impossible to get them to sign this agreement as written. The principal objection is the length of time which the agreement runs and the list of patents described as exhibit A, acknowledgment of the validity of which is required according to the present agreement. You will remember that when the matter was first up for discussion it was figured that the length of time which the agreement was to run was to be much shorter, as the Utzman Patent expired in about three years.

I have discussed this matter pretty thoroughly with all of the companies with the exception of the Certainteed Products Com-

¹⁴The "other deal" was Griswold's plan to merge with American a number of the smaller companies such as Niagara, Empire, Ebsary, Atlantic, and Texas, all of whom would then be operating under the proposed American license from USG (R. 567-571, R. 703-714). Avery knew of this plan (R. 5279, 567-571).

pany. I am not in a position to know where they would stand on a contract that only covered the Utzman Patent and run during the life of the Utzman Patent which is about three years. I expect to see them in a short time but I feel confident that all of the rest of the manufacturers will sign such an agreement along the same general lines of your present agreement. I also believe that the Atlantic Gypsum Company who are figuring on going into the Wall Board business will sign such an agreement, but know they will object to an agreement running practically ten years. I expect to be able to report to you in a short time exactly what they are willing to do.

Avery refused, however, to offer an alternative form of license. On November 22, 1926, he wrote Griswold "I appreciate your efforts with the other board manufacturers. I understand your statement of their position, and regret that we have no alternative to offer" (Ex. 129, R. 5283).

B. The conspiracy in 1927

Griswold's failure to induce all other manufacturers to enter into a license arrangement with USG in 1926 did not discourage him. On January 3, 1927, Griswold wrote Avery (Ex. 132, R. 5285):

Am very sorry indeed that we have not been able to reach an adjustment in the matter referred to not only with this Company but all the other people interested

and regret to note that you feel as you do about the matter but am frank to say to you I have not given it up.

You will remember that I started out to *deliver 100 percent of the manufacturers of board that would be willing to sign up on a license arrangement with your company* which at that time only extended during the life of the Utzman patents and at a meeting that was held all of the manufacturers seemed to feel favorable to the matter * * *

Griswold then stated that, "Since the meeting referred to the Certainteed Products Company began the manufacture of * * * an open edge type of board" and is "doing just what I anticipated would be done in case this license agreement was not entered into." Griswold undoubtedly was referring to the admitted fact that late in 1926 Certain-teed commenced the manufacture of open-edge board and sold it at a differential below the price of closed-edge board (R. 243, 281).

Then, following the practice initiated in 1926, Griswold went on to report in the same letter concerning the attitude of other manufacturers with reference to license agreements, stating (Ex. 132, R. 5285-5286):

With the exception of the Certainteed Products Company and the possible change of mind of the National Gypsum Company every other manufacturer now is ready to

enter into a shorter term contract. The Certainteed Company are considering the matter but have not given me a definite answer. If their actions are favorable every manufacturer will then be ready to enter into a shorter time contract which will be along the same general lines of your present contract and if I am successful in getting 100 percent the proposition will be submitted to you for consideration. As indicated above, at the present time, every concern including the Atlantic Gypsum Company is willing to enter into this contract with the exception of the Certainteed Products Company. The National Gypsum Company has so indicated but suggested one or two alternate propositions which I think they would waive providing all the rest of the manufacturers agreed on the proposed contract.

Griswold followed this letter with another written on January 31, 1927, in which he stated (Ex. 133, R. 5286): "I wish to advise that all of the manufacturers of Wall Board have now given me a final answer as to their attitude covering the license agreement with you," and advised Avery that he would be ready to meet with him at the earliest possible date. Avery wrote in answer (Ex. 134, R. 5287), "I gather from your communication that the position of the wall board interests with whom you have conferred is of the nature you indicated in your former letters," and

concluded that although he could hold out no encouragement to Griswold, he would be pleased to see him and discuss the matter. Apparently Avery, like Griswold, had not given up hope that an industry-wide license agreement could be negotiated. Certainly this letter did not close the door to further negotiations.

Griswold conferred with Avery with reference to the license agreement (Ex. 149, R. 5299). A few days later Griswold advised Gloyd of Texas of the conference.¹⁵ Thereafter, between February 17, 1927, and April 13, 1927, Griswold and Gloyd communicated with each other concerning the license agreement. Gloyd expressed a willingness to become a licensee of USG (Ex. 149, R. 5299). Griswold then advised Gloyd that Atlantic "is considering signing up with him [Avery] on a long time contract and Williams of the National Gypsum Company seems to be inclined to sign up on a long time contract. Reeb [Niagara Gypsum Company] is also considering it favorable" (*sic*) (Ex. 150, R. 5300).

Gloyd replied that "if the folded edge business comes up again with Mr. Avery you can count

¹⁵ It will be recalled that as early as June 2, 1926, Griswold advised Avery that he was anxious to obtain from Avery a copy of the USG-Beaver license contract to send to Gloyd (Ex. 106, R. 5262, *supra*, p. 26). In this connection, it is of interest that Griswold wrote Gloyd at a later date that, "I have you in mind at all times when I am talking with Avery * * *" (Ex. 152).

us in line" (Ex. 151, R. 5301). Griswold then wrote Gloyd, "Atlantic Gypsum Company have signed up their contract with the United States Gypsum Company" (Ex. 152, R. 5302). Gloyd replied that he had definitely "decided to apply to Mr. Avery right away for a license" (Ex. 153, R. 5303). Griswold replied expressing the belief that he was positive Gloyd would have no difficulty in securing the license from USG (Ex. 155, R. 5304), and at the same time Griswold advised Gloyd of the attitude of National. Griswold wrote (Ex. 155, R. 5305):

It may interest you to know that I had an interview with the National people while in Chicago the other day, and when discussing the subject, they seemed to be thinking more favorably than they ever did, [and] I am expecting them to arrive at a conclusion when they discuss the matter further with Mr. Avery.

A week earlier, on March 24, 1927, Griswold had written to Williams of National, in part, as follows (Ex. 136B, R. 5289):

I have not had the pleasure of hearing from you since discussing the board proposition with you in Buffalo and I suppose Mr. Haggerty is home, as he expected to be in a few days.

I am very glad to inform you that the Texas Cement Plaster Company decided recently to enter into the license agree-

ment with the United States Gypsum Company, but I am still further pleased to advise you that since they reached that decision, they have reached the decision to join in our proposition so that they will become one of the group which we are merging. The Atlantic Gypsum Company signed up their agreement and the Certainteed Products Company are considering it with much greater favor. I would like to urge upon you to discuss the matter with Mr. Haggerty, because our organization, when we get lined up, will soon reach an agreement, which, if the Certainteed comes in, and I am sure they will, *will make it 100% with all manufacturers who will be operating under the license agreement*¹⁶ and will do away with the legal

¹⁶ In the opinion below the district court referred to "our proposition" and "make it 100%" as they appear in this letter (Ex. 136B), and drew the inference that Griswold was speaking solely with reference to his "contemplated merger" (R. 4113). While this may have been true of "our proposition," it was clearly not so as to the phrase "make it 100%." It is clear that Griswold at no time had in mind that Certainteed, referred to in the same sentence, would join his merger (R. 73). The only reasonable construction of what Griswold meant, therefore, when he said "make it 100%," is that all companies would then be parties to the license arrangement. In fact, he says plainly that "if the Certainteed comes in" that "will make it 100% with all manufacturers who will be operating under the license agreement * * *" (Ex. 136B).

The court's further inference that Griswold's use of "united action" in Ex. 123, *supra*, p. 28, and "deliver 100

complications which have existed in the past and which are so unpleasant as well as expensive.

Meanwhile, during this period Blagden continued to be busy in promoting the idea of an industry-wide license arrangement. A letter written by Griswold stated (Ex. 157, R. 5306) that "Mr. Avery, who has been opposed to granting them [Certain-teed ~~and others~~] a license, has finally yielded to the persuasion of Mr. Blagden, Mr. Palmer and myself and has consented to consider their application."

Despite the attempt to persuade all nonlicensees to become licensees, only two price-fixing license agreements were entered into during 1927, i. e., the USG-Atlantic and the USG-Texas licenses (R. 6289), both of which were substantially iden-

per cent" in Ex. 132, *supra*, pp. 25, 31, also referred solely to his merger is manifestly erroneous. There is nothing whatever in these exhibits, or in the testimony concerning them, to justify any other construction than that Griswold was referring to "united action" under the license arrangement, and not to his proposed merger.

The trial court, further, failed completely to appreciate that, had Griswold been successful in his merger plans, it was his intention that the merged company would itself take a license with USG. His merger plan was, therefore, not inconsistent with the plan "to deliver 100 per cent of the manufacturers of board that would be willing to sign up on a license arrangement" (Ex. 132, R. 5285), but was in fact an alternative means by which that might be accomplished. The record is clear beyond possibility of misconstruction on this point (R. 567-571).

tical (R. 280) with the USG-Beaver license (*supra*, p. 23).

During 1926 and for several years prior thereto the price of board had been fairly stable (R. 571-572). However, every witness conversant with the facts testified that, beginning in 1927, board and plaster prices became increasingly demoralized (R. 572-573, 654, 902, 940-941, 2488-2489, 2527, 3573, 1329-1330, and 1390). Griswold testified that some of the "independent manufacturers" were quoting lower prices "on certain types of board"; that one of these independent manufacturers, Certain-teed, offered open-edge board "at quite a low price"; that to meet this competition, other manufacturers started selling culls of covered-edge board; that the price of No. 1 open-edge board "was disturbed to a certain extent"; and there was "quite a lot" of the open-edge board sold "at a lower price" (R. 572-573). Actually, Henning's report to the board of directors of USG showed a considerably more aggravated condition, and one which was giving USG great concern (R. 6380, 6385, 6396, 6402, 6409, and 6415). For example, Henning's report for 1927 contained the following (Ex. 619, R. 6403):

The competitive conditions outlined in my last report have become more keen and aggravated. The price conditions anticipated and the price declines recommended

are now a reality. There is not a commodity nor an area which is not now highly competitive. Prices in some areas have gravitated as low as cost. Following our recommendation in our last report, we are meeting any price made by any competitor on any commodity in order to hold and increase our establishment. It was necessary on January 20 to announce a reduction of \$5.00 per thousand on Sheetrock to meet price concessions and lower prices offered by our competitors. It was also necessary to introduce and offer a subgrade board—Crown Wallboard—at a mill price of \$20.00 per thousand, or ten dollars less than our regular Sheetrock price. This drastic policy of price decline was absolutely necessary in order to stabilize the market and to make it possible for us to meet competitive conditions.¹⁷

The Sheetrock referred to by Henning was the standard No. 1 closed-edge board which USG had sold for many years at \$30 per thousand (Ex. 616, R. 6382). Had USG and other companies not introduced a lower grade board, it is obvious that the price of Sheetrock and comparable boards

¹⁷ The court found (Fdg. 60, R. 4155), "The gypsum industry in the 'Eastern area' was in a demoralized condition in the years 1927-1929. There was litigation, bad feeling, price cutting. The prices of board had fallen so low that for some manufacturers business was no longer profitable. Prices could not go down and business continue; any change would, as a matter of economic necessity, be upward."

would have been further depressed by the competition of the open-edge board made by Certain-
teed and other nonlicensees.

Griswold testified that he favored industry-wide licensing to eliminate the competition of other types of board. He stated (R. 574):

Q. Was this competition between the No. 2 Board, and the open-edge board, and the No. 1 Board, and the variance in prices, was that one reason why you favored the license agreements, to eliminate competition?

A. Well, I figured that if these people elected to take out a license, naturally they would want to manufacture the best board they could, which it was pretty universally recognized was this closed edge type board; and if they did that, naturally that would have a tendency to eliminate these other boards from the market because they were only put out to compete with and raise a disturbance, as a rule."

¹⁵ In Fdg. 56, R. 4154, the trial court found: "There were no informal side agreements between USG and any of its licensees or between any of the defendants herein that they would discontinue making open-edge board or seconds of closed-edge board, or that USG would advance and stabilize the prices for board, or that all or any of the companies would increase their prices for other gypsum products * * *." Griswold's testimony, *supra*, and the other evidence to be discussed herein, leaves no doubt that all parties fully understood that industry-wide adoption of the license agreements would bring about all of the results mentioned in Fdg. 56. Moreover, such results in fact followed the signing of the agreements in 1929. Cf. Fdg. 60.

C. The conspiracy in 1928

On January 20, 1928, Certain-teed purchased the assets of Beaver (R. 1441-1442). Certain-teed was then making an open-edge board at its Texas mill and selling this board in competition with closed-edge board at \$12 per thousand in all areas of the United States except the central area, where the price was \$15 (Ex. 620, R. 6411). At that time Beaver was making a closed-edge board under a price-fixing license from USG. Certain-teed refused to assume this license and pay a royalty on its open-edge board as the USG-Beaver license required (R. 41). On February 23, 1928, USG instituted suit in the District Court of the United States in Illinois against Certain-teed and Beaver asserting that Certain-teed should be required to assume all liabilities of Beaver under its license agreement and seeking an injunction against the distribution of the proceeds of the sale to the Beaver stockholders (Ex. 321, R. 5874, Ex. 323, R. 5876). Certain-teed was required to post a million dollar bond, or otherwise suffer a temporary injunction, as security for damages which might be found to be due USG (Fdg. 9, R. 4136). Certain-teed therefore commenced making an open-edge board at all of its Beaver plants (R. 282).

On February 29, 1928, Avery, Blagden and George M. Brown of Certain-teed met in Chicago to discuss the questions raised by the suit (R.

1442). Brown testified that he "got nowhere" in his meeting with Avery (R. 1438) but, he wrote in a memorandum of this conference (Ex. 212, R. 5376):

The attitude of the U. S. Gypsum Company at the meeting yesterday was firmly in favor of a closed agreement until 1937 although the main patent runs out next year and, so far as we know, any patent situation thereafter *would be very flimsy and probably would not justify any benefits of any kind.*

With reference to the suit filed by USG, Brown wrote in this memorandum (Ex. 212):

Working along these lines we must prepare to answer the suit of the U. S. Gypsum Company. We should appear as a party to it and we should claim what we believe to be true, that the suit is filed not in the interest of royalties but for the sole purpose of trade domination and monopoly and price control—all of which mean far more than the total of royalty could possibly mean. Our Company has been selling an open edge board entirely satisfactory to our trade at much lower prices than we would have been permitted to sell closed edge board but we have been able to reach the Southwest trade only. They are determined, if possible, to prevent our extending like opportunities to our Eastern trade. We have offered to continue a royalty basis on the Beaver Board plants and even to in-

clude our Texas Plant during the life of the patent, with the possibility of continuing thereafter. This is all they could fairly ask under any conditions. It is more than they were entitled to but their determination to gather in a monopoly, if possible, leads them to risk everything for such domination because of the big rewards possible, if they can succeed. It is not the matter of royalty in any sense that is of importance.

In accordance with these convictions, the answer filed by Certain-teed on March 14, 1928, alleged that the license agreements which had been entered into with USG and the suits which had been filed by USG were not for the purpose of securing royalties to USG but for the purpose of restraining competition; that the purpose of requiring the payment of royalties on unpatented board was to prevent the manufacture and sale of the competing open-edge board; and that the purpose of the suit against Certain-teed was to "prevent this defendant from increasing its manufacture and sale of 'open-edge' wallboard and becoming an even stronger competitor of complainant in the wallboard business" (Ex. 324, R. 5947-5948).

Griswold met with George M. Brown on or about April 12, 1928. He testified that Brown's attitude was (R. 604): "As I remember it, Mr. Brown at that time stated that if all of the other manufacturers, or certain ones of them, took out a license, he might possibly consider it, but he felt

that his competitors, especially since Ebsary and the Certain-teed Products were pretty hot competitors in that territory, he felt they should both be licensed."

Blagden, who was still active in promoting industry-wide licensing, had one or more conferences concerning them with Avery about this time. On April 12, 1928, Griswold wrote McCrady, president of American, that Blagden had contacted him, and added (Ex. 141, R. 5292):

* * * that inasmuch as he [Blagden] and I had done as much or more work than anybody else on the license agreement between the Wall Board manufacturers and the U. S. G. Company some time ago, the result of which the Beaver Products Company, the Universal Company, the Texas Cement Plaster Company and the Atlantic Gypsum Company had entered into a license agreement with the U. S. G. Company, that he in the last two or three weeks had had one or more conferences with Avery of the U. S. G. Company and he had also talked to his own people, the principal of which is George M. Brown, President of the Certain-teed Products Company, and it was his own personal opinion that if The American Gypsum Company, the National Gypsum Company, the Ebsary Gypsum Company and the Niagara Gypsum Company would all get together and agree and then some of us talk to George M. Brown, President of the Certain-teed Products, it

was his opinion that Mr. Brown would agree to join us, and he felt pretty sure that Brown would join.

You remember I reported when I was in New York I had a two and one-half hour conference with Brown, at which time he stated very plainly to me that they were willing at that time to enter into a license agreement without any particular changes in it providing all of the manufacturers, including Ebsary, would enter into it and make it one hundred percent.

When I was in Chicago about ten days ago I saw Avery for a few minutes and I was given to understand by him that notwithstanding the fact they had an injunction suit against the Certainteed Products Company to try to make them carry out the Beaver Products Company's license agreement, the U. S. G. was willing to drop the suit against the Certainteed providing the Certainteed would carry out the Beaver Products Company's contract. Of course, we have got to make allowance to the fact that Blagden is now connected with the Certainteed Products Company and he may be acting as Brown's spokesman in this case, it really being the object of the Certainteed Products Company to get matters fixed up again and the markets stabilized.

Griswold concluded his letter (Ex. 141, R. 5292) as follows:

For your information will say that the Wall Plaster market will never be straight-

ened up or stabilized providing the Wall Board and Gypsum Lath market remains in the condition it is. "There is no question but that if the Wall Board market were fixed up the Wall Plaster market would automatically be affected at the same time. Blagden was very anxious to know what our position in the matter would be and I told him that I could not tell him until sometime about the middle of the coming week. He seems very anxious to get at the matter at once, because he thot if it could be done now, before the market gets to the extreme bottom like it is in the south-west territory where plaster is selling for \$2.50 a ton, it would probably be much easier to get it fixed up than it would be when matters get worse."

In addition to contacting Griswold and suggesting to him that a committee of manufacturers call on Brown, Blagden conferred with Brown concerning the license agreement. He testified

"Griswold testified that along about this time he had a conversation with Avery in which they discussed whether or not a stable price on board would have an effect upon the price of plaster. His testimony was (R. 622):

"I would say that we probably exchanged views on the possibility of that being the case, because that naturally would follow; that if prices on one of the principal products of a company were at a fairly remunerative basis, and had been changed to that basis, and another article they sold was sold below the cost of manufacture, it was natural to figure that it would influence to a certain extent the lower prices, that a man wouldn't be trying to make all of his money on one product he was selling, and giving the other one away."

that he advised Brown to take a license from USG, and explained to him the benefits of such a license. He explained to Brown that he could not afford to make a board without a closed edge, that the cost was prohibitive, and that the closed-edge board was a superior product. He further testified as follows (R. 831):

Q. Did you talk to him about stabilizing prices under a license agreement?

A. I told him that, undoubtedly, if he were in with the others he would get the benefit of stabilization.

Q. By "stabilization" what do you mean?

A. Stable prices.

Q. And by "stable prices" do you mean uniform prices?

A. He would get the benefit of the license price, which would be the same price.

In 1928, Holland, a newcomer to the gypsum industry, became president of Universal. Despite the fact that Universal had been a licensee of USG since 1926, Holland in 1928 became extremely active in promoting industry-wide licensing (R. 916). Sometime prior to September 10, 1928, Holland had written to Griswold and Griswold replied advising Holland as to American's attitude (Ex. 144, R. 5295). Holland testified (R. 897-898):

Q. Do you know of any reason why Mr. Griswold would write this letter to you, sir?

A. Well, at that time I would have liked to have had everybody making closed-edge board, and I think probably, or that you might, have suggested to Mr. Griswold to take a license similar to ours with the United States Gypsum Company.

* * * * *

Q. Why did you want to see everyone making closed-edge board?

A. Well, that was a better board. Wall-board generally would get a black eye where it was sold with an open edge. That would be one reason, just a sound business reason.

The open-edge board usually sold for less than the closed-edge board, and yet, as you were meeting competitive prices, you would never know for sure whether you were meeting the price on an open-edge or a closed-edge board, and I thought it would be beneficial to the industry to have the people making one kind of board.

Holland replied to Griswold's letter, stating (Ex. 145, R. 5296):

In the second paragraph of your letter of September 10 you state you believe that possibly your company could be interested in a modified license agreement on closed edge wallboard. I wish you would give me definite information, if you care to, as to just what your idea of this license agreement should be, stating clearly all of the points you think should be covered. I

would not expect to use this information received from you other than as a background in approaching this whole situation when the proper time comes.

I think Mr. Haggerty and others interested are still of the opinion that some time in the near future I should attempt to arrange a meeting; in order to be in a position to intelligently handle the situation I should have a very definite idea from everyone involved as to just what they hope to accomplish in such a meeting.

Griswold replied implying USG was not sufficiently interested in securing a stabilized market to make concessions. He stated (Ex. 146, R. 5297):

There apparently is no question but that the other manufacturers would all welcome better market conditions, but such conditions cannot be brought about without the U. S. Gypsum Company wanting better market conditions and being willing to make an attempt to improve conditions themselves. So far as I know they have not shown any indications up to the present time that they cared for better market conditions. Conditions are settling down to what might be quite a siege in warfare. Everybody is getting ready to hang out as long as they can, and hoping, of course, that it will not be long before an armistice of some kind is agreed upon and the warfare ended.

Holland answered on September 20, 1928, stating (Ex. 147, R. 5298):

I am afraid that nothing can be done toward stabilization until the board matter is entirely out of the way. I believe that Mr. Avery has been very definite in a statement to that effect. Inasmuch as Certain-teed, National, and others are unwilling to negotiate any on the board proposition until your decision is clearly defined, it would seem that the entire matter rests with your decision.

Possibly you are better able to negotiate this yourself, but several of us have thought that maybe we could get farther by having a meeting of several representatives of firms who are involved in the board situation. It might at least be worth while trying, and such a meeting would at least result in finding out just exactly wherein the difference of opinion exists. I was in hopes that you would be in a position to attend such a meeting in case the others were so disposed. If any change takes place in your position, I would be very glad to be informed if you so desire.

On October 11, 1928, a meeting was held attended by Holland and representatives of other companies which had not yet signed an agreement. Black of American reported what took place as follows (Ex. 203, R. 5367):²⁰

²⁰ Black was called as a witness, identified the letter, Ex. 203, and confirmed that the meeting was held. The force of the exhibit was not impaired upon cross-examination. (R. 1353.)

Referring to the conferences in New York, the following gentlemen were asked to go to Mr. Ebsary's room Monday evening: Mr. Holland, president of the Universal Gypsum Company, Mr. Reeb, Mr. Haggerty, Mr. Baker—a little later on Mr. Walker and Mr. Warren Henley of Certain-teed arrived.

Mr. Ebsary is exceedingly anxious to have something done to straighten things up, and I noticed that Mr. Haggerty and Mr. Baker also seemed considerably more anxious than they were thirty days ago. It seems that Mr. Ebsary had passed the word around that the President of the Certain-teed would be present at the meeting in New York, but Mr. Walker announced that Mr. Brown had started that day on a week's vacation but in case it was decided to have a meeting in Chicago this week, he thought that Mr. Brown would be pleased to return and attend the meeting. It was then decided I was to get in touch with you and see whether or not it was convenient for you to come to New York on the following day and I, of course, reported to them, after talking with you, it was not convenient for you to be in New York this week, but that you would meet the above mentioned gentlemen in Chicago some day next week in order to call on Mr. Avery, if such an action was decided upon.

After the meeting on Tuesday, Mr. Ebsary asked the same gentlemen to go over

to the Certainteed Office, and Mr. Walker, in particular, and supported by Mr. Holland, took the same position they did the day before, that everyone must be very sure before going to Chicago that they were willing to walk up and sign up a license agreement with the U. S. G., and also to foot the bill whatever it may be. He also stated that he was very sure that their *Mr. Brown would not be willing to take out a license agreement with the U. S. G. on board unless it carried with it a general cleaning up of unsatisfactory conditions of all gypsum products.*

It was very apparent that the Certainteed, as well as Mr. Holland of the Universal, were trying to get every one present to commit himself to practically do whatever the U. S. G. would dictate, and Mr. Walker said that Mr. Brown would be glad to use his efforts to get the U. S. G. to make the back royalty payments, if there were any, of the National and ourselves as low as possible. As you know, the Universal people are already operating on the U. S. G. license on board, and it seemed to me that Mr. Holland was mainly a representative of the U. S. G., and I am inclined to think that he reports everything in detail that goes on at these sessions to Mr. Avery. My part, of course, was to listen and report to you, and I made it very plain that all decisions regarding these matters rested with you.

Shortly after this meeting in Mr. Ebsary's room, representatives of National had further conferences with representatives of USG concerning a license agreement, as a result of which the board of directors of National adopted the following resolution on November 27, 1928 (Ex. 197, R. 5355):

The President related in detail the occurrences in connection with the meetings held in Chicago recently in the matter of license agreement on plaster wallboard, and on motion of Mr. Borer, seconded by Mr. Currie, it was

"Resolved, That the proper officials of the CORPORATION be and they hereby are authorized and directed to take such action as regards entering a license agreement with the United States Gypsum Company on plaster wallboard as they may see fit."

The demoralization of the price structure which was under way in 1927 continued in an even more aggravated manner throughout 1928. Henning of USG reported in 1928 as follows (Ex. 620, R. 6411, 6412, 6414):

Plasterboard— * * Competition is now offering cut stock bundled plasterboard at \$10.00 to \$12.50 mill. However, we have not as yet reduced any prices on Rocklath, but are still holding the same \$15.00 price. We are meeting competitive board with our own bundled cut stock. * * **

All wallboard— * **

We are endeavoring to maintain a differential of \$5.00 between Sheetrock and Crown and Sterling board and have been successful in holding 65% of the footage on Sheetrock for the first 6 months; however, for the month of July this percentage has been reduced to 48%.

Due to Certain-teed's activities, who are now offering wallboard for \$12.00 in all areas except the central area where they are on a \$15.00 price, Crown has gravitated to \$14.00 and \$16.00 which was necessary to hold establishment and get tonnage. With the wide spread between \$14.00 on Crown and \$25.00 on Sheetrock, making a \$11.00 differential, it has been necessary during July to drop the price of Sheetrock in order to hold Sheetrock in the markets. In these areas we are now quoting Crown at \$14.00 against Certain-teed's \$12.00 board and holding Sheetrock at \$18.00 and the same applies proportionally where other prices on Certain-teed prevail. We look for further declines both in Sheetrock and Crown prices with increased tonnage and establishment.

* * * * *

General—Competition is more aggressive than last quarter and there is no market on any of our materials. We are trying to sell all products at a differential above our competitors' prices and are making a consistent effort to hold Sheetrock rather

than sell Crown, however, losing no establishment or footage on account of price. * * *

D. The conspiracy in 1929

On January 7, 1929, Holland wrote Haggerty, of National, stating (Ex. 204, R. 5369):

I wonder if you have had any talk with Mr. Kling [of American] regarding the settlement of litigation between his company and the U. S. Gypsum Co. I have heard indirectly that they are committed among themselves to a settlement but that they have hopes of reducing the amount involved by delaying the time of settlement.

It is my opinion that we should make an effort to hold another meeting of those interested in the board situation. Mr. Kling surely should consider the others involved to the extent of at least letting us know what they propose to do so that yourself and others could be governed accordingly.²¹

Rather than initiate the move again myself, it would probably carry more weight if you and Mr. Brown would request me

²¹ The trial court in its summary of Exhibit 204 omitted reference to this part of Holland's letter (R. 4103). But it was important to Holland that American should reach a decision so that the others "could be governed accordingly." In other words, the true import of the letter is that unless all, or substantially all, of the industry should sign up under the licenses, prices would become still further demoralized, and Holland wished to avoid that.

to call such a meeting. Personally, I cannot see how the American can hope to gain anything at all by delaying the settlement because of the fact this delay is going to be the cause of demoralizing prices during most of 1929 unless the situation is handled promptly.

The implication of the second paragraph of this letter that each license was not a separate and isolated transaction is supported by Holland's testimony. He testified that "I hoped that other board manufacturers would take out a closed-edge license, take out a license on the closed-edge patent," * * * that "I think I kept trying to talk these people into taking out a license," * * * and "I imagine that I talked to all of them" (R. 931-932).

Haggerty wrote Holland in reply on January 9, 1929 (Ex. 205, R. 5370):

When I was in New York Saturday, I had a few minutes with Kling and took the occasion to very pointedly question him on his attitude toward the license agreement. He told me very definitely that they had decided to stay out and I, personally, am willing to accept that as a conclusion.

The question now in my mind is whether or not the other four board makers, who are outside the license agreement, feel that it would be advantageous to go in without the American Gypsum Company. It would

seem to me that the chief value in a meeting would be to discuss that point.

As far as we are concerned, there is one question that has come up in my discussion of the subject with some of our directors: and I have not been able to answer it satisfactorily. It is this. At the present time, the United States Gypsum Company is naturally unwilling to discuss price, but would feel free to do so under the license agreement because of the price control feature which, as I understand it, gives them that right. If this price control feature was discontinued in August, as is the case in the present form of the agreement, how could we expect the cooperation of the United States Gypsum Company in anything bearing upon a discussion of prices? Would not their position then be exactly what it is now, and rightly so?

If this assumption is correct, then is not the price control feature during the eight-year period of very vital importance, provided it can be worked out, and what is the conclusion of the United States Gypsum Company on that phase of the matter?

My talk with Kling was so brief that I did not have a chance to discuss the reason for his conclusion, but I do recall that the objection he made to the present form of license agreement, *when I talked the matter over with him in Atlantic City, was that*

there was no price control beyond next August, when the Utzman patent expires.

I would like to hear from you if you care to let me have your opinion before determining our interest in attending another meeting, particularly if Kling does not recede from his present attitude.

It will be noted that while Haggetty, like Holland, was interested in the position that American was going to take concerning the license, he was probably much more disturbed about the manner in which prices could be controlled after the Utzman patent expired on August 6, 1929. Holland promptly replied on January 12, 1929, stating (Ex. 206, R. 5371):

I am inclined to think that the matter of future prices is not the deciding factor in the attitude of the American Gypsum Company on the wallboard proposition. You will remember that Mr. Avery made it very clear to us that if this plan could not be worked out on the Utzman patent that there were other patents available and we were all agreed that the fact that the Utzman patent expires next August is not a practical reason for continuing the conflict.

It is my opinion that if you and the others interested in the settlement of the wallboard controversy bring enough pressure to bear on the American crowd that something can be done. You will remem-

ber that Mr. Kling stated several times that they would be materially influenced by the attitude of the other men involved and I believe we should make an effort to hold him to this idea. *I am quite sure that Mr. Avery would not be interested in negotiating settlements unless everyone involved was included.*²² However, if after conferring with Mr. Brown and Mr. Reeb it is thought advisable that this should be done, I would be willing to make an effort to bring this about.

I am expecting to be East next week, at which time I will talk further with Mr. Brown and will communicate with you later as to his ideas. In the meantime, if you have any new information I will be glad to hear from you.

²² The trial court referred to Exhibit 206 (R. 4104), but omitted entirely two very significant points: (1) it made no mention of the second sentence that "Mr. Avery made it very clear to us that if this *plan* could not be worked out on the Utzman patent that there was other patents available * * *," and (2) no mention likewise was made of the statement that "Mr. Avery would not be interested in negotiating settlements unless everyone involved was included."

After omitting these sentences, the trial court stated that it is clear that Exhibit 204 and Exhibit 206 "have no reference to an alleged USG plan to blanket the industry under patent licenses" (R. 4114). On the contrary, it is submitted, the plain import of these exhibits, when read in their entirety, is that there was a very definite "plan" afoot to bring the entire gypsum industry under licenses for the purpose of stabilizing prices. In fact, Holland said unequivocally in Exhibit 206 that there *was* a "plan," and the inference is

Holland was asked to explain the meaning of the language used in this letter. His answers for the most part consisted of a series of "I don't know's" or "I don't remember's" (R. 937-943). He did testify, however, that he wrote truthful letters (R. 938-939):

Q. I see. Well, again I want to say that I am not casting any aspersions on your truthfulness, and I don't want you to think that the next question does, but I want to ask you—did you write truthful letters?

* * * * *

The WITNESS. Well, I will answer the question this way, that I always try to write truthful letters.

Q. And your statement there that "Mr. Avery made it very clear to us that if this plan could not be worked out on the Utz-

irresistible that the plan was for the industry to take out licenses under the Utzman patent, or some other, in order to stabilize prices. The trial court's treatment of this evidence is entirely without basis.

The court stated further that Holland was interested in helping "his company as well as the other manufacturers out of their unfortunate financial situation due to the litigation and the price war" (R. 4114). That is, Holland wanted the others to join in the "plan" in order to end all-price competition in the industry. It is submitted, therefore, that so far from excusing Holland in his activities, the court's statement is in effect an explicit finding that the appellees were engaged in a conspiracy to organize the gypsum industry and stabilize prices as charged.

man patent that there were other patents available," and so forth—is that a truthful statement?

A. I would think so, yes, sir.²³

Following this exchange of letters between Holland and Haggerty, on May 14, 1929, the board of directors of National Gypsum Company held a meeting "for the purpose of discussing the license agreement submitted to all the manufacturers of gypsum products in the United States east of the Rocky Mountains by the United States Gypsum Co." (Ex. 198, R. 5356). At this meeting "the Chairman [Mr. Baker] outlined the principal provisions in the contract and stated to the Board that he had been definitely informed that all other manufacturers of gypsum products east of the Rocky Mountains, except the American Gypsum Company, had agreed to sign the license contract in substantially the form as submitted to this

²³ The trial court in its opinion made no mention of this part of Holland's testimony, but was at some pains to say that *Griswold* did not have "any understanding with Avery or anyone else that price control would be extended under some patent after the expiration of the Utzman patent; that he never had any discussion with Avery or anyone else about Avery's finding some patent other than the Utzman patent to give a longer price control * * *". (R., 4115). This testimony of *Griswold*, who left the industry in 1928, in no way discredited the uncontradicted and unimpeached testimony of Holland as set forth above.

Board.²⁴ That a final meeting was to be held in Chicago, Ill., within a week following this date, for final disposition of the license contract, and it is therefore imperative that immediate action be taken by this Board on the proposed contract * * * (Ex. 198, R. 5356). The board of directors by resolution authorized their officers to execute the proposed contract.

After this meeting of the board of directors of National on May 14, 1929, events moved rather quickly. On May 16, 1929, National signed a license agreement with USG (Ex. 3, R. 4239) and on the following day, May 17, 1929, Baker of National sent the following telegram to Avery (Ex. 716, R. 6521):

²⁴ The trial court stated that the recitals in Exhibit 198, above quoted, are "equivocal", and hence apparently of no probative value, because "it is no more inferable from these minutes that the various (prospective) licensees had agreed with each other to sign the license contract with USG than it is that they had agreed severally with USG to do so" (R. 4116).

Exhibit 198, as in the case of other exhibits, is not to be disposed of piecemeal, but is to be read in the light of all other evidence in the case. Viewed in the light of the other evidence discussed *supra*, it is clear that Exhibit 198 means that all manufacturers except American, had finally reached an understanding among themselves that they would take out licenses. In fact, the exhibit itself shows, in a part omitted by the court, that "a final meeting was to be held in Chicago * * * within a week * * * for final disposition of the license." This was the general meeting of May 21, 1929, to be discussed later, which could not have been held except by concerted action. The exhibit, therefore, is not equivocal, but when read realistically shows a concerted plan to which National was a party.

Our contract signed and in mail Reeb ready
 Stop We are working with Ebsary with hope
 of everybody being set by Saturday to justify
 your calling meeting all board makers
 Monday if you like.²⁵

Upon the receipt of Baker's telegram, Avery
 immediately wired Gloyd as follows (Ex. 720, R.
 6524):

There has been much discussion of infringing
 settlement and license on board. Nothing has yet
 developed although I think it safe to say the
 outlook is favorable. If license were generally
 closed it would be desirable to discuss a
 reasonable market price for the licensed product.
 Will keep you informed in hope that you may
 participate if outcome favorable.

²⁵ The court below (R. 4116), in discussing this telegram (Ex. 716) and other related evidence referred to in the opinion, stated that it is conceded that the May 1929 meeting of licensees and prospective licensees was "prearranged." But the court said this is "not necessarily" evidence that the parties were engaged "in a common plan or enterprise to blanket the entire gypsum industry with licenses and stabilize prices." The court pointed out (1) that each prospective licensee *might* have gone to Chicago merely to see that one of the others did not get better license terms, and (2) each would "naturally be interested in attending the meeting in order to know whether the others were going to settle with USG." Even Channing of Atlantic, an existing licensee, and presumably Holland of Universal, who also attended, might have gone for the same reasons, in the court's opinion (R. 4117). These inferences, even if true, are not inconsistent with the plain inference that the May meeting was called and everyone was present as part of a plan to organize the industry and stabilize prices.

Before Gloyd answered the above telegram, USG received from American the license contract with material changes in it. Avery again acted promptly and on May 18, 1929, sent identical telegrams to Holland of Universal (Ex. 207, R. 5372), Brown of Certain-teed (Ex. 318, R. 5873), Baker of National (Ex. 725, R. 6526), Ebsary (Ex. 724, R. 6526), and Gloyd (Ex. 721, R. 6524). These telegrams were as follows:

Mr. Kling has sent in a contract with material changes and declares he will not attend meeting unless these changes are accepted by us Stop We cannot accept them and regret that the Tuesday meeting will be futile unless other companies wish to proceed as outlined without American license.

Gloyd was absent from his place of business when Avery's telegram arrived. He returned on May 20, 1929, and wired Avery that he hoped "all take out license with you on board" (Ex. 722, R. 6524). Upon receipt of Gloyd's wire, Avery wrote him as follows (Ex. 723, R. 6525):

Thanks for your telegram of May 20. I regret very much that you cannot be with us at the meeting to be held tomorrow, although it does not seem to me that the situation makes it necessary. For the past several months, most of those manufacturing boards and infringing our patents have indicated a readiness to pay damages and to take out a license. The American Gypsum Company, however, have been unwilling to subscribe to the terms, the conditions.

in our opinion require. Mr. Brown, Mr. Reeb, Mr. Ebsary, and the National Company have expressed themselves favorable to this adjustment and it is not improbable that the matter may be closed at the meeting tomorrow or soon thereafter. You will, of course, be fully informed of what takes place.

It should be noted that the implication that Certain-teed and Ebsary were infringing is incorrect. Both were manufacturing only open-edge board (R. 1388, 2477).²⁰

Avery's expectation "that the matter may be closed at the meeting tomorrow," was correct. A meeting was held at the Palmer House, Chicago, during the period May 21 through 23, 1929. At this meeting there were present one or more representatives of every nonlicensee board manufacturer in the Eastern area, except American and Kelley, and one or more representatives of all existing licensee board manufacturers except the Texas Company. George N. Lenci, vice-president of Ebsary Gypsum Company, attended this meeting and described in some detail just what occurred (R. 2472-2476). Lenci related that

²⁰ The court below in Fdg. 90, R. 1161, found that Texas, Certain-teed, and Ebsary were the only companies that prior to their licenses made open-edge board. This finding is contrary to the admitted facts in the case. The admitted facts are that American and Niagara also manufactured open-edge board prior to their becoming licensees. See answers of USG, (R. 282), Certain-teed (R. 243), Celotex (R. 201), and Ebsary (no denial in answer, R. 164) to paragraph 71 of the complaint (R. 17).

when all the manufacturers were assembled in one room on May 21, 1929, Avery made a short statement and "welcomed us as prospective licensees" (R. 2475), and, among other things, stated "that if all companies would take out a license from USG, that that would correct the demoralized condition which the board industry now found itself in" (R. 2476, 2485). Lenci recalled that at some time during the first day of the meeting either Mr. McLeish (counsel for USG); or Mr. Avery, "illustrated their point by saying that under the General Electric case it was permissible for the owner of a patent to fix the price of a patented product" (R. 2794).

Lenci testified (R. 2967) that the Ebsary Company had decided to become a licensee of USG before going to the May 1929 meeting.²⁷ He testi-

²⁷ The lower court found (Fdg. 37, R. 4150), that "the decision to take a license was reached by each of the companies independently" and that, "the licensees took their respective licenses, without regard to what other companies did." The first part of the finding may well be true in a limited sense, that is, that each company had to decide for itself what it would do. Lenci testified that Ebsary had reached a decision before it went out to Chicago. Whittemore testified to the same effect (R. 1398). But the finding that each company acted "without regard to what other companies did" is manifestly and completely erroneous. In the first place Avery was not "interested in negotiating settlements unless everyone involved was included" (Ex. 206, R. 5372). In the next place the May meeting was admittedly "prearranged" (R. 4117), and substantially the entire industry attended. Avery, and everyone, recognized that by bringing the whole industry

fied that the reasons for this decision were (a) principally that his company desired to make a closed-edge board (R. 2970), and (b) that "we did hear that there would be a price control feature in the license, and that was not unattractive to us" (R. 2970). Two factors warrant doubt as to the importance of the first reason: first, that Ebsary had at no time previously applied to Avery for a license to make a closed-edge board (R. 2967), and second, that in May 1929, when Ebsary took a license, the Utzman patent which related to closed edge board had only some 11 weeks to run, or until August 6, 1929, before it expired. At the very least, however, Lenci's testimony indicates that a substantial reason for Ebsary's actions was in fact the "price control feature in the license."

This conclusion is substantiated by Lenci's further testimony that the competition between open-edge and closed-edge board resulted in a price

under the license it would be possible, for the first time, to have effective price control (Ex. 720, R. 6524; Ex. 723, R. 6525). It would scarcely be possible to get stronger or more positive evidence that, contrary to the court's finding 37, the May licenses were signed by each licensee with complete "regard to what other companies did."

In the case of the November licenses the evidence, which will be discussed later, again shows conclusively that the industry acted as a unit and not "independently." Lenci, for example, testified that Ebsary had pretty well made up its mind at the May meeting to sign the November license (R. 2810), and on July 17, 1929 (Ex. 423, R. 6121), Lenci asked counsel to review the draft contract for the July meeting in Chicago, so that if "all of the other Companies agree to it we will be in a position to do the same."

spiral which had reached such a point in 1928, and particularly in 1929, that his company was in a rather serious financial situation. He testified (R. 2971):

Q. So that it was extremely important to you, from a business standpoint, to get on the one hand a closed-edge board, and on the other hand to make sure that the price conditions were going to be corrected so that you could make a profit?

A. Yes.²²

²² The court below found that the companies which became licensees did so: (1) "because they desired to settle or avoid litigation," and (2) "to obtain the right to use USG's patents" (Fdgs. 36, 74, R. 4149, 4158). It was further found that USG, in addition to wanting settlement of the litigation, granted the licenses in order to obtain (1) "royalties," (2) "the fixing of a profitable price," and (3) "the various advantages which would normally flow from the general manufacture and sale of the superior product" (Fdg. 74, R. 4158).

It will be noted that the court failed to find that the *licensees* wanted "the fixing of a profitable price" and the "various advantages" which would result from selling a uniform product. Of course it is scarcely conceivable that *only* USG could have wanted the advantages to come from "the fixing of a profitable price." In fact, Lenci gave uncontradicted testimony, as noted above, that one of the reasons why Ebsary signed the May license agreements was "to make sure that price conditions were going to be corrected" so that he "could make a profit." The court below said (R. 4114) that Holland also "was interested in promoting better conditions so far as marketability of gypsum board was concerned in order to help his company as well as the other manufacturers out of their unfortunate financial situation due to the litigation and the price war."

After the parties were all assembled in one room on the first day of the May 1929 meeting and after Avery had made his short talk to them, each non-licensee manufacturer, except Ebsary, then met separately with representatives of USG and proceeded to work out individually the details of their settlement of the USG infringement claims and the claim against Certain-teed.²⁹ By the afternoon of May 22, 1929, all the non-licensee manufacturers present were able to reach an

The record is also very clear that the licensees wanted to make a uniform product. The point was made on June 4, 1929, by Geo. M. Brown in Ex. 226 (R. 5391), where he speaks of the advantages of "stabilizing the whole industry by making a uniform product and get away from the fierce war-fares between different products like we have recently had." Holland testified (R. 897-898) that, "I thought it would be beneficial to the industry to have the people making one kind of board."

It is accordingly submitted that the findings are clearly erroneous in that the court should have found that the licensees, as well as USG, signed the license agreements for the express purpose, *inter alia*, of (1) "fixing a profitable price" and (2) gaining the "various advantages" to flow from industry-wide manufacture of a uniform product. Indeed, the fact that the Utzman patent had less than three months to run when the licensees were first accepted strongly suggests that the licensees were not really motivated by fear of USG's patent position. When the November licenses were signed, the Utzman patent to make the "superior" closed-edge board had expired and the litigation had all been settled, except in the case of American, and that was settled on November 25, 1929 (R. 4446).

²⁹ The USG suit against Certain-teed was settled at this time and the million dollar bond posted by George M. Brown was released (Ex. 327, R. 5953).

agreement with USG and the licenses were signed (Exs. 4 and 5; R. 4253, 4267). These license agreements were substantially identical with the Beaver agreement (Ex. 1, R. 4205), except that they contained the following additional provisions: (a) the licensees agreed to sell gypsum board to manufacturers, jobbers, and other wholesale distributors only with the written consent of USG; and (b) the licensees agreed to use only USG's bundling patent in packaging their board for shipment.

On the afternoon of May 22, 1929, all of the licensees, both new and old, were again assembled in one room and at this time USG passed out to each licensee a price bulletin (Ex. 404, R. 6090). Lenci described what took place, as follows (R. 2972-2973):

Q. And the whole group of licensees were present at that time?

A. I don't remember whether they were all there at that time, but I would say the great majority were there.

Q. You had all signed up your license agreements by that time, and USG then handed out their prices?

A. Yes, after that.

Q. Now, were you surprised when you opened the envelope and saw what the prices were?

A. We were surprised, because we hadn't any idea of what they were going to be.

Q. Were they higher or lower than the prevailing prices at that time, Mr. Lenci?

A. I am not sure, but it is my recollection that they were about what the USG Company was getting for their board at the time.

Q. And that was higher than you were getting for your board?

A. Yes.

Q. So that were you displeased with the prices that they handed out at that time?

A. I don't think I was, no.

Q. As a matter of fact, wasn't everyone there present rather well pleased with the prices?

A. I couldn't speak for others, I don't know.

Q. Did anybody say that they were too low or too high or anything about it?

A. The only comment I recall was that somebody made the remark that they hoped they would get \$30 wallboard, that is the only remark I remember.

Q. Do you know who made that remark?

A. I haven't the ghost of an idea.

Q. And \$30 wallboard would have been putting wallboard back to the position where Sheetrock had been for a number of years?

A. Yes.

Q. Now, as a matter of fact, Mr. Lenci, the prices of gypsum board couldn't very well go any lower and permit companies to stay in business, could they, at that time?

A. It would have been very difficult.

Q. So that an honest answer would be that your expectation, and that of every other licensee there, was that they were going to be stabilized and raised?

A. We were all human enough to hope that, yes.

Q. And you weren't disappointed?

A. No.³⁰

The license bulletins passed out by USG on May 22, 1929, introduced a number of new practices into the industry. The principal innovation was the establishment of a basing point price system (Ex. 404, R. 6090), limited to only seven shipping points.³¹ Board prices to dealers were

³⁰ The court below (Fdg. 58, R. 4155) found that: "The licenses were not executed with an intent to fix prices of gypsum board at high levels or any given levels. There was at no time any understanding or agreement or even discussion as to what the prices of gypsum board would be upon the execution of the licenses." It is surely clear from Lenci's testimony, as above quoted, which was uncontradicted and unimpeached, that both old and new licensees *understood fully* that, when all the licenses were signed, prices would go up. In fact, the court itself, in Finding 60 (R. 4155), found that "any change would, as a matter of economic necessity, be upward." It is perhaps true, as the court found, that there was no understanding as to the precise "high" or "given" levels at which prices would be fixed, but such a finding does not negative the fact that it was understood that they would be raised to some level. And the circumstance that all parties were content to delegate to USG the ultimate task of dictating the price does not alter the fact that they understood and intended that prices would be raised. Finding 58 is, therefore, manifestly erroneous.

³¹ Exhibit 404, as it appears in the record, lists Acme, Texas, as an eighth basing point, but this is a printer's error.

to be calculated on the basis of a fixed mill base price plus freight from the nearest of these seven points to the point of destination. Since board made by different manufacturers varied in weight it was necessary also to prescribe a uniform billing weight of 1,850 pounds per thousand upon which to calculate the freight charge (R. 6093). Only by so doing, could the price to dealers be kept uniform. In addition special provisions were made for truck deliveries. All wallboard seconds were to "be plainly marked with visible red stamp" as seconds. Such elaborate regulations, when considered in the face of the fact that the Utzman patent was to expire in eleven weeks, suggests strongly that there was a general understanding that price control was to continue under some other patent.

On May 23, 1929, the same manufacturers were again assembled in the Palmer House for their third joint meeting. It was at this meeting that Avery made good on his previous assurance to Holland, "that if this plan could not be worked out on the Utzman patent that there were other patents available" (Ex. 206, R. 5371). According to Lenci, Avery told those assembled that USG had secured the American rights for the Bayer application for a patent on a process to make a so-called "bubble board." Roos, of USG, also had an application pending for a patent for a similar process. Avery explained that the inven-

tions related to a lightweight board made by the introduction of soap foam in the gypsum slurry (R. 2531-2532), and proposed that the industry take out licenses under the Roos and Bayer applications (R. 2982).

Following the last day of the May 1929 meeting, Avery promptly sent out to all licensees a proposed license agreement under the Roos and Bayer applications (R. 2531-2532; Ex. 224, 225, R. 5389, 5390). Thus on May 29, 1929, Avery wrote to George M. Brown (Ex. 224, R. 2389) that they had "drawn up a tentative and suggested outline of license for the bubble system which we discussed when you were here." On June 4, 1929 (Ex. 225, R. 5390) Brown acknowledged the receipt of the copy of the license agreement and stated that, "We are most anxious to promote harmony and friendship in the Gypsum Industry, especially with your own Company * * *." On the same date, Brown also wrote a candid memorandum about this proposal, the material portions of which are as follows (Ex. 226, R. 5390):

A claim was made by Mr. Avery in his conversation that 50¢ and, perhaps, \$1.00 of cost would be saved on each thousand square feet. Of this, 25¢ would go to pay royalty. Another unknown part would go to pay for equipment of a lot of machinery and it would take a good while to get even. They would have a price control of our busi-

ness, which might be to our advantage and might be to be our disadvantage in future. *They should be just as anxious to have us use this as we should be to get it if there are to be the benefits that they anticipate in stabilizing the whole industry by making a uniform product and get away from the fierce warfare between different products like we have recently had.* The saving is too slight to cause us very great worry even if never permitted to use it and the door will certainly be open later for its use if it has the merit that they believe it has. Under a contract sufficiently liberal, we should proceed at once.

A meeting of all licensees was held in Chicago on June 6, 1929, attended by all of the licensees with the possible exception of Texas (R. 2529). According to Lenci, who represented Ebsary, Henning of USG presided, and, among the matters discussed was the proposed new price-fixing patent license agreement recently submitted to the licensees by USG (R. 2531). The licensees were advised by Henning that American expected to become a licensee (R. 2533). At this time Henning asked those in attendance to "get after" their lawyers to look over the proposed license contracts and send to USG their comments concerning the contracts (R. 2531). C. O. Brown, assistant to the president of Certain-teed, attended the June 6 meeting and shortly after wrote a memorandum of what occurred, which leaves no

doubt that the licensees were greatly interested in promoting price control by means of price-fixing patent license agreements in order to maintain stabilized market conditions in the industry. The material portions of the memorandum are as follows (Ex. 227, R. 5392-5394):

Price control on plaster board expires in August of this year with the expiration of the Basic Patent. Price control on plaster board can be extended for another 17 years if a satisfactory working arrangement can be made with the Bubble Patent. For legal reasons, however, the bubble patent should not be considered from the standpoint of price control but should be gone into by each manufacturer from the standpoint of economy and benefit. Price control would naturally follow such a move.

Mr. Knode, Vice-President in charge of Manufacturing, of U. S. G. Company estimates a saving in manufacturing cost under the Bubble Patent to be 50¢ to \$2.00 per thousand, depending on the type of board made. Mr. Knode of the U. S. G. Company will be glad to have any of our manufacturing men call on him and go into the proposition in detail and assure themselves of the saving in cost and its advantages, prior to signing license. I would suggest that Mr. Van Hagan arrange to see Mr. Knode sometime in the next two weeks, the reason for this being that the lawyers feel that speed is advisable in lining up various manufacturers under this

Patent and upon the expiration of the Basic Patent on plaster board, even though the patent will not be issued by that time, and it will be necessary to pay a royalty of 25¢ per square, prior to actual issuance of the patent on any board manufactured. This will not be a hardship, however, if the saving is as outlined and they assure us that they can prove that their figures are conservative. 2

* * * *

The lawyers are very emphatic that there is a much less chance of being accused of using the patent as a subterfuge to control price—first being, it is gone into before the expiration of the Basic patent on plaster board and second, it is gone into from the standpoint of economy in cost.

The lawyers that have gone over the patent and made a careful study of the situation pronounce the patent a very strong one if and when issued.

Sometime prior to July 3, 1929, a conference was held between George M. Brown, A. Whittemore, and C. O. Brown, all connected with Certain-teed, at which conference it was decided that Certain-teed would become a licensee of USG under the Roos and Bayer Application (Ex. 228, R. 5394). C. O. Brown wrote a memorandum of this conference "To be attached to bubble contract and bundling contract between United States Gypsum Company and Certain-

teed Products Corporation." In this memo, C. O. Brown wrote as follows:

Taking these things into consideration, plus other advantages in working under the patent, we feel justified in taking a license and paying the royalty set out by the licensor.

When questioned what was meant by the phrase "other advantages," Brown testified as follows (R. 1069):

Q. I want to take you to the second page, the first line. There you say, "Taking these things into consideration, plus the other advantages," and so forth, and I would like to ask you what the "other advantages" are that you had in mind there?

A. There would be a stabilized market on gypsum lath.

Q. And by "stabilized," you mean what?

A. Price control.

Both George M. Brown and A. Whittemore approved the reasoning of C. O. Brown for on the face of the memo itself George M. Brown wrote, "O.K. to sign up GMB," and Whittemore wrote, "7/3/29, O. K. AW" (Ex. 228, R. 5394).

On July 23, 1929, the board of directors of National met and discussed the proposed license under the Roos application. The minutes of this meeting indicate that the industry was not so much concerned with the Roos application as an advancement in the art of making gypsum board,

but instead, was interested in it as a means of stabilizing prices. The material portions of the minutes are as follows (Ex. 200, R. 5362):

The President stated that the United States Gypsum Company has been working on a plan to stabilize the Gypsum Industry and has offered to license the entire Industry under the new method of manufacturing gypsum wall board known as the "Bubble System." The license agreements submitted to each of the wallboard manufacturers contain price fixing clauses and under the agreements submitted the prices of wall board would be fixed for the whole industry for the term of approximately seventeen years.

The President further stated that if co-operation in the Industry could be accomplished by such means, he believed that it would be worth while for this Corporation to enter into such an agreement, if the "Bubble System" could be obtained for a reasonable consideration.

Upon motion duly made, seconded, put to vote and unanimously carried,

"Resolved, That the Executive Committee of the Corporation be and they hereby are authorized and empowered to negotiate and enter into an agreement or agreements with the United States Gypsum Company, controlling the manufacture of gypsum .

wall board, upon such terms and conditions as a majority of the said Committee shall deem most advisable, *provided that the United States Gypsum Company, by virtue of the agreement with this Corporation and with other manufacturers of gypsum wall board, shall control the price of wall board sold in the United States and its possessions."*

Two days after Baker advised his board of directors about the plan of USG to stabilize the gypsum industry, a conference was held in Chicago which was attended by substantially all the licensees of USG. This conference was held on or about July 25, 1929 (Ex. 612, R. 6366, Answer) of USG to interrogatory No. 34). C. O. Brown wrote a memo of this conference in which he stated, "considerable progress was made between the attorneys on an agreement for contract covering Bubble license" (Ex. 231, R. 5402). However, events did not move too smoothly at this conference, for Brown writes that "There are difficulties outside the contracts, however, which prevent two Companies, Universal and National Gypsum Company, from signing." Brown sets forth these difficulties as follows:

The Universal Gypsum Company is suing the National Gypsum Company for infringement of the Starch Patent sold by Mr. Haggerty, formerly connected with National, to the Universal Gypsum Com-

pany. In selling this patent, Mr. Haggerty recognized its validity and the contract is binding on the National Gypsum Company, making it almost impossible for them to contest the Patent." It is my understanding that Universal are asking National to pay damages in the amount of \$250,000. National, of course, does not want to contract a double obligation until this is settled.

The Universal Gypsum Company are placing the blame for not signing on the fact that they have not assured themselves that the Bubble process is more economical than the Starch process and the fact that they are in the hands of the receivers would make it impossible for them to bind themselves for a longer period than the receivership. Other attorneys, however, feel this is largely a smoke screen for not signing and it is my opinion that they feel by holding out they can make the Starch patent of value by forcing it on the industry by sale or on a royalty basis whereas if they and National sign the Bubble Patent, which National would not do before first getting a release from Universal on their

²² In Fdg. 12, R. 4139, the court below found that in the case of *Universal Gypsum & Lime Co. v. Haggerty*, 21 F. 2d 544 (W. D. N. Y.), the litigation mentioned in the text, the district court held that Haggerty patent No. 1,500,452 was valid. This finding represents a misreading of the opinion in that case. Judge Hazel did not decide that that patent was valid, but that defendant was estopped to challenge its validity.

Starch Patent litigation, then their Starch patent would be practically no value.

The United States Gypsum Company advise that they have nothing to fear from the Starch Patent under their present Bubble process. There is some doubt as to the strength of this Starch Patent and, of course, all of the Companies, if they did use it, would be free to contest its validity in case of litigation, with the exception of the National Gypsum Company.

According to Brown, although the United States Gypsum Company felt that it had nothing to fear from the Starch patent, nevertheless, "in the interest of harmony, however, the USG Company has been making some tests to see if there was any value in combining the two processes, the Starch and the Bubble" (Ex. 231, R. 5403). Brown then suggests that the real purpose of USG in combining the processes was not so much to advance the art in the industry by the use of the starch patents, but instead, the two were to be combined to provide a means for immediate price control. He wrote (R. 5403):

* * * They [USG] advised that, based on their experiments to date, they feel there would be some benefit to using Starch in a limited degree with their Bubble process, such a combination resulting in better working of the Stucco, fewer Seconds, etc.

²² The starch patents referred to are the Hite and Haggerty patents (R. 60, 64).

Further benefit could be derived by combining the two patents due to the fact that the Starch Patent has been issued, whereas only applications have been filed under the Bubble Patent, so a combination of the two systems would give a patent to work under in the manufacture and sale of Gypsum Wallboard immediately, whereas under only the Bubble process there would be an interim between August 6th and the date of issuance of the Bubble Patent where there would be no Patent control. There is, of course, considerable benefit to having Patent control continue without a break.

Brown further stated in his memorandum that, "Mr. Avery spent considerable time in the last two days with Mr. Holland * * * trying to work out some mutually satisfactory proposition for buying the Starch Patent, or licensing the industry under both the Starch and Bubble process," and also that, "There will be further conferences between Universal and U. S. G. within the next ten days and another meeting is to be held in Chicago on either August 5th. or 6th when the situation will be discussed further." (Memo attached to Ex. 231, R. 5405.)

A meeting of licensees was held in Chicago on August 6, 1929, the day the Utzman patent expired, which was attended by substantially all the persons who had attended the meeting on July 25, 1929 (Ex. 612, R. 6366, Answer of USG to Interrogatory 34). C. O. Brown wrote a memo of what

transpired and from this memo it is apparent that some time prior to August 6, 1929, USG and Universal had reached an understanding on the starch patent. Brown stated (Ex. 231, R. 5400) that a "proposition has been submitted as follows":

USG to take over Starch Patent of Universal, no cash is to be involved in the transaction but Universal to get a free license under USG's Bubble Patent * * *

Before the Starch patent of Universal was injected into the picture, it was planned to continue the license and price control on Board through USG's Bubble Patents when issued * * *

It would be the plan to write one contract covering all Patents involved, Machinery Patent on closed-edge board, Bubble Patent, Starch Patent, and Bundling Patent. The Attorneys feel that such a contract would be exceptionally strong and price control could be maintained for the life of the Contract without difficulty.

* * * * *

The National and Universal have settled their litigation on basis of cash settlement by National to Universal. With this settlement everything seems to be in shape to go ahead under Patent control continuing without a break, if we are willing to pay 3 1/2% royalty.

All of the Independent Gypsum Companies are willing to sign on this basis * * *. Another meeting will be held dur-

ing the week of August 20th at which time it is hoped that a contract can be agreed to and signed * * *

On August 27, 1929, the board of directors of National held a meeting, the minutes of which state (Ex. 201, R. 5364):

*Resolved, That the President of the Corporation be and he hereby is authorized and empowered to sign a license agreement with the United States Gypsum Company covering the use of the Bubble and the Haggerty Patents, * * * provided that all the present licensees of the United States Gypsum Company enter into a similar license and provided further that in the judgment of the President such action will result in legal stabilization of the markets.*

On October 3, 1929, C. O. Brown pointed out that USG would not "turn over all information on this [the bubble process] prior to the License being signed," but this delay would not interfere with immediate price control. He wrote (Ex. 234, R. 5408):

This delay will not interfere with the operation of patent and price control, as the Universal Starch patent will control that feature and royalty will start as soon as the license is signed. We are all using enough Starch to say we are making Board under the Universal Patent.

New price-fixing patent license agreements based on the Roos "foam" application, and the

Hite and Haggerty "starch" patents which Universal sold to USG for that purpose, were thereafter executed. These licenses became effective with respect to price control on November 5, 1929 (Ex. 235, R. 5409). See Exs. 6, 7 to 13 inclusive, and 15; R. 4280, 4315, 4337 to 4448, and 4474.

The agreements entered into by each licensee with USG under the so-called "starch" and "foam" patents were substantially identical and, among other things, provided in substance as follows:

(a) USG agreed to disclose the "foam" process to its licensees.

(b) In addition to the Hite and Haggerty patents, and the applications relating to the Roos or Bayer process, the licenses included all the patents and applications which were licensed under the previous agreements.

(c) USG reserved the right to determine and fix the prices at which the licensees sold board (1) "manufactured by licensee by use of any of the machines or appliances covered by any letters patent * * *"; "or" (2) "manufactured by second parties and which shall embody the inventions * * * claimed in either patent number 1,500,452 or * * * 1,230,297"; "or" (3) "commencing with the date when a patent shall have been granted upon the Roos or Bayer applications any of said board manufactured by licensee, the body or core of which is made according to the

process * * * of said Roos or Bayer inventions * * *."

(d) The licensees agreed to pay stipulated royalties on all board whether patented or unpatented.

(e) USG licensed the licensees to use the methods covered by certain of its patents in packaging gypsum board, and the licensees agreed to pay royalties on packages of all kinds whether patented or unpatented.

(f) The licensees agreed to sell gypsum board to manufacturers and other wholesale distributors only with the written consent of USG.

(g) Jobbers were defined as "those who do not manufacture but buy and sell * * * board in straight or mixed cars * * * and who do not sell at retail," and no consent was required to sell to them.

(h) The licensees acknowledged, and agreed not to contest, the validity of all patents then issued and of all patents subsequently to be issued on applications described in the agreements.

It should be noted that while the foregoing agreement covered 50 patents and seven applications for patents, the only new patents and applications for patents that were not already covered by the so-called May 1929 agreements were the Hite and Haggerty "starch" patents, three applications by Roos on the "foam" process, and the Bayer application.

E. Concerning Texas, Newark, and Celotex

Texas was the only licensee under the Utzman patent that did not sign the license agreement under the Roos application and the Hite and Haggerty patents at approximately the same time the other licensees signed. On February 10, 1937, after the license it acquired in 1927 had expired, Texas finally signed up (Ex. 8, R. 4337). At that time it was, of course, a matter of common knowledge in the industry that prices on board had been fixed for a number of years and Texas had long been familiar with the general licensing arrangements and sold its board at "prevailing prices" (R. 3435). Texas admits that since February 10, 1937, it has complied with the USG price bulletins (R. 183-184).

Kelley Plasterboard, the predecessor of the appellee, Newark Plaster Company, was not a licensee under the Utzman patent. Kelley, however, did sign the November agreements on the "starch" and "foam" patents on April 23, 1930 (Ex. 15, R. 4474). Thereafter Kelley attended a number of licensee meetings, particularly the licensee meetings of October 17, 1932 (R. 2602), of November 15, 1932 (R. 2640), of December 13, 1932 (R. 2672), and on April 27, 1933 (R. 2709).

Newark Plaster Company acquired Kelley in 1937, and, Tomkins of Newark testified that when

his company acquired Kelley he had talked with officers of USG and was conversant with the general licensing arrangements that existed in the industry (R. 1861). Newark assumed the license to Kelley (Ex. 16, R. 4495).

Celotex did not become a licensee until 1939. American, the predecessor of Celotex, had long been an active member when Celotex took over its business. American's license with USG, dated November 25, 1929 (Ex. 13, R. 4446), was assigned by American to Celotex on April 12, 1939 (Ex. 14, R. 4469).

In the nature of the case, Celotex had no part in the early negotiations. However, it does appear that C. F. Miller, Manager of American, who continued as Manager of American Gypsum Division of Celotex (R. 1374), after April 12, 1939, had met with Avery in the early license negotiations between American and USG, and was fully conversant with the purpose, scope, and effect of the licensing arrangement (Ex. 310, R. 5859).

Moreover, Celotex admits "that USG entered into similar agreements with National, Universal, Atlantic, Ebsary and Certain-teed * * *" (R. 204). Celotex also admits that "from the year 1939 to the date of filing of said complaint, USG has determined and fixed minimum selling prices and terms and conditions of sale of this defendant as its licensee * * *" (R. 206).

F. The Metallized Board Licenses

"Metallized board," which USG claims to be covered by another Roos patent, is nothing more than ordinary gypsum board or gypsum lath except that one surface of the "board" has affixed thereto a paper-thin sheet of metallic foil. Generally speaking, it may be manufactured by the same process that is usually employed in the manufacture of board or lath (R. 3439). However, since the commonest purpose of using this type of "board" is to reflect both heat and cold, and since its most common use in the building field is to provide insulation, it is usually used as lath. The metallic foil side is placed next to the studding and the plaster coat is applied to the room side of the "board." Usually, it is made in the same dimensions as common gypsum lath (R. 2788).

By 1934 the industry had been operating under price-fixing patent license agreements for a period of approximately five years. By this time, as will be later pointed out (*infra*, pp. 102-160), the industry had been thoroughly organized at all levels and its prices had been stabilized. At a meeting of board licensees held on May 23, 1934, USG presented to those present a price-fixing license agreement relating to metallized board. It was the intention at this time to bring all existing licensees under this new patent license agreement.

As Henning of USG wrote Lenci of Ebsary on August 20, 1934 (Ex. 547, R. 6238):

At the board license meeting May 23d, 1934, we presented you with a contract for the reflective backing of plasterboard and wallboard.

It was the intention to license all of our board licenses, and to date we have received nothing from you in regard to your position on this matter.

Please give me your comments or criticism.

Under date of August 20, 1934, USG sent similar letters to Atlantic, Universal, and American (Exs. 287, 208, 308; R. 5841, 5373, 5858). By September 6, 1934, National, Certain-teed, and Universal had expressed their willingness to enter into such a license, and the attitude that these companies took concerning this license was communicated to Atlantic (Ex. 288, R. 5842). By September 24, 1934, American also had agreed to become a licensee under this agreement, and the fact that Universal, National, and American had "agreed to sign the license" was also communicated to Certain-teed (Ex. 244, R. 5420).

During these negotiations the prospective licensees also were in communication with one another on the subject. For instance, under date of June 23, 1934, National sent a letter to American enclosing a copy of an opinion concerning this proposed license submitted to them by their

attorney (Ex. 300, 300A, R. 5851, 5852). The attorney's opinion concluded with this language (R. 5854):

* * * I assume from our conversation that *in the interest of harmony in the Industry*, that you did not desire to have me make any objections to any matters contained in the proposed agreement, which are not, in my opinion, of major importance.

Under date of September 18, 1934, American wrote National that it was ready to sign the license agreement (Ex. 302, R. 5855).

In the fall of 1934 Certain-teed contemplated selling metallized board to their trade. They at first decided not to manufacture it but to purchase their requirements from USG at the usual manufacturers' discount. However, when they approached USG to buy, USG refused to sell until they became a licensee under the metallized board patent. C. O. Brown wrote his district managers about Certain-teed's experience with USG (Ex. 247, R. 5423):

Attached is price information sent out by Licensor on metallized board.

We have signed a license on this product but do not contemplate manufacturing it at the present time.

U. S. Gypsum Company will sell us this board, unbranded, at published prices less 12% on lath and 15% on board. They were not willing to do this until we signed a license. * * *

Brown's statements are supported by Henning's [USG] letter to Certain-tyed in which he said in part (Ex. 245, R. 5421):

I do not think at this time that we are contemplating selling this commodity to you, and believe that it would be wise for you to figure on manufacturing it.

In order to have a price control on this commodity it will be necessary for you to take out a license to manufacture it.

Ebsary also had the same economic pressure put upon it to sign the agreement. They were not permitted to purchase metallized board at a discount until they signed the license agreement with USG (R. 2769; Exs. 548, 694; R. 6239, 6493). After the agreement was signed Ebsary could and did buy board at a discount (R. 2769).

Eventually all of the manufacturers who were licensees under the so-called November 1929 license agreements, except Texas and Niagara, became licensees of USG under substantially identical licenses relating to metallized board. These licenses were entered into late in 1934 or early in 1935 and are in force at the present time (Exs. 17 to 25, inclusive; R. 4499 to 4587). From the time they were entered into, USG has fixed and determined the price at which the licensees sold metallized board (Exs. 249 to 253, inclusive, R. 5427 to 5782).

USG's price fixing was based upon a provision in the license which reserved to them, "the right to determine * * * during the existence of

said patents and so long as said rights, licenses, and privileges hereunder granted shall continue, the minimum price * * * at which Licensee shall * * * sell plaster board having a metallized surface which is covered by said Roos Patent [Patent No. 1,914,345, relating to metallized board] or any of the patents set forth in Schedule A * * *." (Exhibit 11 attached to complaint, paragraph IV, R. 116.)

Under date of April 12, 1939 (Ex. 23, R. 4571), an agreement was entered into between American and Celotex whereby Celotex assumed American's metallized board license (Ex. 22, R. 4559). On January 3, 1939, an agreement was entered into between USG and Newark whereby USG consented to the assignment of the Kelley metallized license to Newark (Ex. 25, R. 4585). Texas was not a licensee under the metallized board agreement.

G. The Perforated Lath Licenses

Perforated lath is ordinary gypsum lath with holes bored or stamped through it. The claimed purpose of placing holes in the lath is to allow the plaster to penetrate through the holes and form a mechanical key on the reverse side to hold the plaster to the lath better. Since perforated lath is a substitute for ordinary lath it is made in the same dimensions as ordinary lath.

Perforated lath is old in the art. As early as September 7, 1917, Makowski applied for a patent

on a board of this type of lath and in the application stated (Ex. 605, R. 6321):

The invention relates to a new and useful art particularly to means for perforating stable or dry wall board; and to the process of forming holes or recesses therein adapted to act as key holds for bonding finishing plaster coats applied to the wall board, and to a new article of manufacture.

United States patent No. 1,349,778 was issued to Makowski on this application on August 17, 1920 (Ex. 605, R. 6321). Even prior to that date, six United States patents had been issued on that type of lath (Ex. 602, R. 6307). As a matter of fact, the Schumaker Wall Board Corporation, as early as 1926, had manufactured perforated lath on the Pacific coast that had holes through the lath $\frac{3}{8}$ of an inch in diameter and the holes were spaced about $3\frac{1}{2}$ inches apart horizontally and $2\frac{1}{2}$ inches vertically (R. 3545; Ex. 313, R. 5862).

In the USG Patent, No. 1,938,354, Roos claimed to have invented a new perforated lath, the distinctive feature of which was that it had $\frac{3}{4}$ inch holes punched through it arranged in horizontal and vertical rows 4 inches apart (R. 3620-3621). The Roos board passed the Bureau of Standards' one-hour first test. Late in 1936 National made a perforated lath with holes $\frac{7}{8}$ of an inch in diameter arranged in a staggered manner (R. 3470-3471, 3615), and in 1938 Schumaker made a board with holes $\frac{13}{16}$ of an inch in diameter

(R. 3524). Both the National and the Schumaker board passed the one-hour fire test (Ex. 610, R. 6328; Ex. 611, 6345).

USG first offered its licensees a price-fixing license to manufacture and sell perforated gypsum lath under the Roos patent early in 1936. (See answers of defendants to paragraph 115 (R. 30) of the complaint.) In order to get an expression from the industry on this proposal, Henning of USG called a conference of licensees to meet on March 11, 1936 (Ex. 313, R. 5862). The conference was held on that date and representatives of USG, Atlantic, American, National, and Certain-teed attended (Ex. 313, R. 5862). At this conference Henning presented the case for USG and told those present: (a) that USG proposed to place this type of board on the market about April 1, 1936; (b) that USG would be willing to license all licensees to manufacture and sell this type of board on a 10¢ royalty basis; (c) that USG proposed to set a minimum price of \$15.25 per thousand square feet; and (d) that USG would furnish those who accepted the new license with their requirements of perforated lath at the usual manufacturers' discount, pending installation by the licensee of equipment for manufacturing this type of board (Ex. 313, R. 5862).

The proposed plan did not meet with unanimous approval; it was pointed out to Henning, (a) that the plan to offer this type of board to the

trade on April 1, 1936, did not afford to the industry sufficient time for any proper consideration of all factors involved; (b) that the royalty proposed was too high; (c) that the proposed minimum price was too low and should be at least \$16.00 per thousand square feet; and (d) that the proposed patent under which the licensees were to be licensed was of doubtful validity since perforated lath had been marketed on the Pacific coast for the past twenty years under such trade names as "Key Hold," "Button Lath," and "Lock Lath" (Ex. 313, R. 5866). The price at this time fixed by USG for ordinary gypsum lath was \$15.00 per thousand. This meeting was adjourned without the licensees coming to any definite decision.

Two days after this meeting, Henley of Certain-teed prepared a memorandum of what transpired at the conference and sent it to Whittemore, vice president of Certain-teed (Ex. 313, R. 5866-5867). In this memorandum Henley pointed out the advantages to Certain-teed that the proposal afforded: (a) if they became licensees they would be able to use the fire test data at hand and would not be put to any additional expense in having any type of lath they might develop fire tested; (b) that by accepting a license, Certain-teed would save the expense of any patent investigation; (c) that by accepting a license, Certain-teed could get into production at

an early date; and (d) that acceptance by Certain-teed would bring about a "strengthening of license arrangement" (Ex. 313, R. 5862). The last reason, of course, indicates that Certain-teed recognized the new license as further support for the general "license arrangement" existing in the industry.

In the same memorandum, Henley also pointed out the disadvantages of becoming a licensee: (a) that if they became licensees, "we recognize a very flimsy (in our opinion) patent"; and (b) that the royalty seemed excessive in view of the questionable value of the patent relating to perforated lath (Ex. 313, R. 5866). Henley concludes with the recommendation, "that any conference we might have with Mr. Henning (at this time) would be unwise and would tend to weaken the position taken generally by the licensees at the conference" (Ex. 313, R. 5867). This recommendation is further evidence that the proposed license agreement was not just a matter of individual concern, but rather was one of importance to the whole industry.

About three years prior to the March 11, 1936, meeting, patent counsel for Certain-teed had advised it that the USG patent was invalid (Ex. 602, R. 6307). Again, exactly one week prior to the conference of March 11, 1936, patent counsel for Certain-teed had an occasion to re-examine Roos Patent No. 1,938,354, on which the proposed

price-fixing license was to be based, and advised Certain-teed as follows (Ex. 601, R. 6303):

I am still of the opinion that the Roos patent is completely invalid. It is a patent for empirical formulae and empirical formulae are ordinarily not patentable since they are within the ordinary skill of any competent research man in the particular art in which the work is done. As I said in my opinion of December 27, 1933, given the Rader patent cited in the file history of the Roos patent and the problem of making a practical commercial perforated plasterboard for the purpose of keying the plaster to the board, with the fire-resistance problem also put up to the plasterboard and plaster man, any one of them would reach practically the same result as Roos reached.

* * * * *

I think the entire patent could be completely ignored with perfect confidence in the outcome of any litigation involving it. It might be expensive to do so, because patent litigation is necessarily expensive, and *it might be unwise to do so from the standpoint of commercial policy, since the patent might be useful, if acquiesced in, for stabilizing the manufacture and sale of plasterboard lath coming thin its terms.*

Within a few days after this conference of March 11, 1936, Henley of Certain-teed conferred with Burley of National concerning perforated

lath. Of this conference, Henley wrote to Certain-teed, in part, as follows (Ex. 314, R. 5868):

In further reference my memo March 23, above subject: Have just discussed subject matter with Mr. Burley of National Gypsum Company and outline below their definite feeling in the matter:

1. Are of the opinion that patent is very weak.

2. To use Burley's expression, they feel USG have a lot of "crust" in asking a 10¢ per M royalty.

3. National's Patent Attorney has advised them to go ahead and manufacture a Perforated Lath with, however, a different size hole and, perhaps, staggered as to location.

* * * * *

5. Burley is definitely of the opinion that USG will not take an alleged infringement (involving Perforated Lath) into court, inasmuch as it would involve probably all of their patents and *there might arise some serious question as to the validity of USG's patent position and the question would arise as to whether or not same were used as a "vehicle" for price-control purposes.*

Notwithstanding the advice of its patent counsel, Certain-teed accepted a license under the perforated lath patent (Ex. 26, R. 4587). In spite of his doubts of the validity of the Roos

patent Whittemore favored taking a license for business reasons (R. 1416). It is a fair inference from this action that Certain-teed was interested in obtaining the advantages of price control. The same is true of USG, for Knode of that company advised Henley of Certain-teed that USG was "not particularly interested in the income received from royalties" (Ex. 335, R. 6002). Ebsary, American, and Kelley also became licensees (Exs. 28, 30, 31; R. 4595, 4604, 4610).

USG first fixed a price of \$15.25 per thousand at which it and its licensees would sell perforated lath (Ex. 313, R. 5862). This represented an advance of 25¢ per thousand over ordinary lath (Ex. 313, R. 5862). USG maintained this 25¢ differential on perforated lath until 1938, when the price for perforated lath was made the same as that of ordinary lath (Ex. 39, R. 5247). At this time USG, recognizing that it could not bring the whole industry under this license, offered to give all of its licensees a royalty-free license under the perforated lath patent (Exs. 27, 29, 32; R. 4593, 4602, 4616). Since acceptance of the license involved recognition of the validity of the USG perforated lath patent, National and Texas refused to become licensees either under the royalty-free agreement or, for that matter, under the original agreement. Celotex did not assume the American license;

Newark became a licensee under the royalty-free license (Ex. 32, R. 4616).

Since 1936 when USG placed its perforated lath on the market, National and Texas have sold the perforated lath marketed by them at the same prices at which USG and its licensees have sold their lath (R. 1594, 3471). No action has ever been brought by USG for the infringement of its perforated lath patent (Answers of defendants to paragraph 120 (R. 31, 296) of complaint). It is a fair inference from this that USG had strong doubts as to the validity of its perforated lath patent and has been reluctant to disturb the peace and harmony established by prior agreements.

IV

OPERATION AND EFFECT OF THE CONSPIRACY

The signing of the license agreements under the Utzman patent in May 1929 by Certain-teed and the other companies who were then making an open-edge board, was a turning point in the gypsum industry. Simultaneously with the execution of these agreements USG issued the first of a long series of so-called price bulletins (occupying 992 pages of the present record) (R. 4619-5256, 5427-5782), each containing progressively more elaborate and detailed provisions, until virtually every phase of the manufacture and sale of gypsum board was controlled and to a lesser degree the sale of re-

lated products. These regulations, cooperatively enforced and uniformly adhered to, have produced a completely regimented and noncompetitive industry.

A. Raising and stabilizing prices

The first price bulletin (Ex. 404, R. 6090) that of May 23, 1929, as above mentioned, set a mill base price of \$20 per M square feet on $\frac{3}{8}$ " wallboard at Oakfield, N. Y., and at each of the six other listed basing points. In addition, at New Brighton, N. Y., the minimum f. o. b. price was put at \$22.60 per M; at Charleston, Mass., \$23.65; and at Buffalo, N. Y., Loveland, Colo. (mixed car shipments), and Philadelphia, Pa., \$22.73, \$30, and \$22.60, respectively. The price for $\frac{3}{8}$ " plasterboard, including lath, was put at \$13.50 per M-sq. ft. at the seven basing points.

These prices represented a very substantial increase over the prices prevailing in 1927, 1928, and the first quarter of 1929. USG had, for many years prior to 1927, maintained a mill price of \$30 per M square feet on its $\frac{3}{8}$ " wallboard, known as Sheetrock. During 1927, however, Henning, Vice President in charge of sales for USG, reported that it was necessary "to announce a reduction of \$5.00 per thousand on Sheetrock to meet price concessions and lower prices offered by our competitors" (Ex. 619, R. 6403). Moreover, "It was also necessary to introduce and offer a subgrade board—Crown Wallboard—at a mill

price of \$20.00 per thousand, or ten dollars less than our regular Sheetrock price" (Ex. 619, R. 6403).

Henning's report for 1928 (Ex. 620, R. 6411) shows that USG's prices had to be still further reduced:

Due to Certain-teed's activities, who are now offering wallboard for \$12.00 in all areas except the central area where they are on a \$15.00 price, Crown has gravitated to \$14.00 and \$16.00 which was necessary to hold establishment and get tonnage. With the wide spread between \$14.00 on Crown and \$25.00 on Sheetrock, making a \$11.00 differential, it has been necessary during July to drop the price of Sheetrock in order to hold Sheetrock in the markets. In these areas we are now quoting Crown at \$14.00 against Certain-teed's \$12.00 board and holding Sheetrock at \$18.00 and the same applies proportionately where other prices on Certain-teed prevail. We look for further declines both in Sheetrock and Crown prices with increased tonnage and establishment.

For the first quarter of 1929, Henning, Vice President in charge of sales for USG, reported (Ex. 621, R. 6416) plasterboard selling at \$12.00, with a statement that "We are meeting this competition with unbranded plasterboard * * *." Moreover, "due to the rapidly declining prices on Crown," it has been necessary "to adjust Sheet-

rock to lower levels in most markets.”” It is evident, therefore, that when in May 1929 USG fixed the mill price for wallboard at \$20.00 per thousand and for plasterboard at \$13.50 per thousand (Ex. 404, R. 6090) this represented a very substantial increase in prices in most markets.”

“ In Fdg. 24 (R. 4146) the court below found that “when the closed-edge board of the Utzman patent came into the market the open-edge board was largely displaced under the demand of the trade for the better product.”

The evidence in the record, without exception, is all to the contrary. Henning's reports for the years 1926-1929 (Exs. 616-621, R. 6380-6418), made it abundantly clear that throughout all this period open-edge board was sold at a lower price to the trade in active competition with closed-edge board. Griswold's testimony is to the same effect (R. 572-573) and the answers of USG and Certain-teed to paragraphs 68, 69, 71 through 73 of the complaint (R. 243, 281-283) admit that open-edge sold in competition with closed-edge board during this period. In fact, the lower court's own finding (Fdg. 20, R. 4161) states that Texas, Certain-teed and Ebsary were making open-edge board during this period, the Court erroneously omitting reference to Niagara and American which also made open-edge board prior to signing their licenses. See *supra*, p. 65. The court's finding is, therefore, manifestly erroneous.

It was only *after* the industry was finally brought together under the 1929 license agreements that open-edge board disappeared from the market. As far as the “demand of the trade” was concerned, after the agreements were entered into, it was simply a case of the trade accepting closed-edge board or nothing; the trade had no choice at all. For the reasons for the elimination of open-edge board, see pp. 108-113, *infra*.⁴

- ³⁵ The court below found that USG “established patented board prices at the levels at which USG had been selling board just prior to the execution” of the May 1929 licenses (Fdg. 88, R. 4161). It is apparent that the court's finding is true only as respects certain markets.

B. Eliminating No. 2 Board

But the increase in price for Sheetrock did not mark the full advance, for Sheetrock, even at \$18.00 per thousand, was being driven off the market. In the first quarter of 1929 more than half of USG's sales of wallboard consisted of Crown or No. 2 board (Ex. 621, R. 6416) which even in 1928 was being priced as low as \$14.00 per thousand to sell in competition with the \$12.00 open-edge board being sold by Certain-teed (Ex. 620, R. 6411). When the May 1929 bulletin was issued (Ex. 404, R. 6090), the price of No. 2 board was advanced to \$17.50. Two weeks later, on June 7, 1929 (Ex. 410, R. 6099), this price was raised to \$18.75, and on June 26, 1929 (Ex. 413, R. 6104), to \$20.00 per thousand. In other words in a space of 5 weeks the price of No. 2 board was raised from a low of \$14 to \$20 and made the same as for No. 1 board.

On July 9, 1929 (Ex. 414, R. 6106) the price of $\frac{3}{8}$ " wallboard was further raised to \$22.50 per thousand. No price was given in this nor has any been given in any subsequent bulletin for No. 2 board, which meant, according to the uncontradicted testimony of Lenci (R. 2518-2519), that No. 2 board was to be sold at the same price as No. 1 board or not sold at all. Obviously no one would pay \$22.50 for No. 2 board when No. 1 could be had

for the same price." Accordingly in the space of roughly 7 weeks a dealer who could have bought USG Crown board at \$14 per thousand now had to pay \$22.50 per thousand for Sheetrock, more than a 50% increase, or do without.

C. *Eliminating seconds*

Substantially the same course was taken in the elimination of seconds, except that it took

³⁶ The court below found that "there is no evidence concerning the elimination of No. 2 board" (Fdg. 91, R. 4162) and "there was no agreement or understanding that * * * No. 2 board would not be manufactured" (Fdg. 67, R. 4157). Contrary to the court's findings, there is strong evidence that appellees intended to eliminate No. 2 board as a first step in stabilizing prices. Griswold testified that when everyone took a license "naturally that would have a tendency to eliminate these other boards from the market because they were only put out to compete with and raise a disturbance, as a rule" (R. 574). Henning confirms that Crown board was put out purely as a temporary competitive measure (Ex. 619, R. 6403). Holland testified that "I thought it would be beneficial to the industry to have people making one kind of board" (R. 898). Geo. M. Brown in Ex. 226 (R. 5390) speaks of the importance of "making a uniform product" and getting "away from the fierce warfares between different products like we have recently had." And, finally, Avery in his report to the stockholders for 1929, stresses the advantages to follow from "a full and *uniform* use of the patented methods" (Ex. 332, R. 5987).

It is submitted that the clear inference from the above evidence is that appellees realized that No. 2 board (and seconds) would be eliminated as soon as possible after the licenses were signed. Moreover, Lenci testified that, as he construed the bulletins, USG had put the price of No. 2 board on a level with No. 1 board (R. 2518-2519), which for all practical purposes eliminated it from the market.

longer. The price bulletins (Exs. 404, 410, 413, and 414; R. 6090, 6099, 6104, and 6106) reveal that by successive steps during a period of slightly more than six weeks the price of seconds was raised respectively to \$15.00, \$16.25, \$17.50, and on July 9, 1929, to \$20.00 per thousand. The differential in price between $\frac{3}{8}$ " Sheetrock at \$22.50 per thousand and seconds was then only \$2.50. By letter dated April 7, 1930, USG advised its licensees that thereafter the price of seconds would be the same as No. 1 board (Ex. 307, R. 5857). No price bulletins have been issued for seconds since that time, and they have been eliminated from the market.³⁷

D. Elimination of open-edge board

It was essential to the success of price control not only that seconds and No. 2 board be eliminated but that unpatented open edge board be taken off the market as well. The years 1927-29 had demonstrated beyond question that USG and its licensees could not maintain a price of \$30 per

³⁷ The court below found (Fdg. 91, R. 4162) that "the evidence fails to establish that there was an elimination of seconds * * *." "Every company unavoidably produces some seconds." It is of course immaterial whether some seconds are *produced*; the question is whether seconds have been eliminated from the *market*. The USG bulletin of April 7, 1930, referred to in the text, and apparently overlooked by the court below, effectually eliminated seconds from the market, since seconds obviously cannot be sold at the same price as No. 1 board. If it refers to production the court's finding is, therefore, meaningless; if to marketing it is clearly erroneous.

thousand for Sheetrock, or even a price of \$25, or \$20 or \$18, when faced with such open edge competition (Exs. 619, 620, 621; R. 6402-6418). As Lenci testified (R. 2970), the effect of having two competing products in the market was that as the price of open edge would be cut the price for closed edge would follow, and then open edge would go still lower. The witness Stormquist, of Universal, testified that he never knew, when being told by a dealer of a competitive price, whether it was for open edge or closed edge board, but that in order to sell he would have to meet the price quoted (R. 3573-3574).

Griswold, of American, gave uncontradicted and unimpeached testimony to the same effect (R. 574):

Q. Was this competition between No. 2 Board and the open-edge board and the No. 1 Board, and the variance in prices, was that one reason why you favored the license agreements, to eliminate competition?

A. Well, I figured that if these people elected to take out a license, naturally they would want to manufacture the best board they could, which it was pretty universally recognized was this closed edge type board; and if they did that, naturally that would have a tendency to eliminate these other boards from the market because they were only put out to compete with and raise a disturbance, as a rule.

Holland, of Universal, was impatient with certain members of the industry for not joining the licensing plan; "this delay," he wrote, "is going to be the cause of demoralizing prices during most of 1929 unless the situation is handled promptly" (Ex. 204, R. 5369). His uncontradicted oral testimony makes it clear that he understood that a uniform product would contribute to stable conditions (R. 940).

Q. Well, why were patents so necessary for the plan you had in mind, or why did you think they were necessary?

A. Well, as I stated before, I thought the industry would be better off by a uniform and better product.

In 1928 Certain-teed was clearly of the opinion that USG wanted to drive open-edge board off the market, "thus restricting or eliminating competition which would otherwise have arisen between such unpatented 'open-edge' wallboard and the patented 'protected edge' wallboard" (Exs. 324, 212; R. 5947, 5376). After Certain-teed joined the plan in May 1929 by taking out a license, Geo. M. Brown made it completely clear that he understood the business advantage to be gained from making a single uniform product. In his memorandum of June 4, 1929 (Ex. 226, R. 5390), Brown wrote:

They [USG] should be just as anxious to have us use this [bubble process] as we should be to get it if *there are to be the*

*benefits that they anticipate in stabilizing the whole industry by making a uniform product and get away from the fierce warfare between different products like we have recently had * * **

Even in the initial negotiations between Blagden and Avery it was recognized that unless a licensing scheme could be worked out there would be serious competition from open-edge board. As Blagden put it (Ex. 185, R. 5344), Beaver "would naturally proceed to produce an open-edge or semi-open-edge" board and, moreover, "manufac-

³⁸ The court below in Finding 40 (R. 4151) found that Exhibits 324 and 212, concerning Certain-teed's expressed belief that USG intended by its licensing plan to dominate the industry and restrain competition, "are at most equivocal in meaning." That is, the court said Certain-teed might have changed its mind and reached the conclusion "that its statement concerning USG's purpose in bringing the suit was erroneous." Moreover, the court said the exhibits "do not establish bad faith in the execution of the license agreement."

In assuming that Certain-teed *might* have changed its mind the court evidently overlooked the Geo. M. Brown memorandum of June 4, 1929 (Ex. 226), quoted in the text; which indicates clearly that Brown had not changed his mind in this respect. He understood fully when he signed the license that the USG plan was intended as a means of "stabilizing the whole industry" (Ex. 226). Exhibits 324 and 212 are not susceptible of any interpretation other than what they say quite plainly; the finding of the court that they are equivocal in meaning consequently is clearly erroneous.

The latter part of the finding that the exhibits "do not establish *bad faith* in the *execution* of the license agreements" does not negative the fact that Certain-teed understood the purpose of the USG plan to stabilize the industry and gave its adherence to it.

turers other than" Beaver "would follow" its "example." At this time, as above noted, Certain-teed and others were preparing to enter the wallboard business.

Two exhibits, uncontradicted in any way, show that Avery understood fully the need for a uniform product if price control were to succeed. The point was made with reasonable clearness in the May 1929 licenses, the fifth "whereas" clause of which reads as follows (Ex. 3, R. 50):

Whereas, Licensor has been unwilling to grant a license except on the express condition that the Licensee will manufacture plaster board or gypsum wallboard *only* with a folded or protected edge similar to that manufactured by Licensor * * *

That is to say USG had openly insisted until May 1929, that only a closed-edge board should be made by its licensees. With the industry for the first time substantially all signed up under the license to make a closed-edge board—or pay a royalty anyway if it made open-edge board—USG was willing, as appears in the sixth "whereas" clause (R. 50), to waive the requirement. What the "fifth" whereas clause establishes, however, is that until May 1929, at least, USG had not wanted open-edge board on the market.

There is nothing to indicate that USG ever changed its position in this respect. In his report to the stockholders of USG for 1929, after the November licenses were in effect and open-edge

board, Seconds, and No. 2 board had been substantially eliminated, Avery made clear what he expected the industry-wide agreements would accomplish (Ex. 332, R. 5986).

The returns to be received [by way of royalties], while substantial, are relatively of a minor amount. The major benefits anticipated are * * * the increased consumption of wallboard products which should follow the quality improvements that a *full and uniform use* of the patented methods and products should assure.

Lenci testified on cross-examination that there was no "understanding" or "agreement" among the licensees that they would discontinue making an open-edge board (R. 3081-3082). The record shows, however, that Ebsary and the other licensees did discontinue making open-edge board immediately after the May licenses were signed (R. 2982, 2553). In fact, Lenci testified that it would have been difficult, if not impossible as a business matter, to pay a royalty on open-edge board as required by the license, and sell such board at a profit (R. 2983). Lenci's testimony on direct examination (R. 2983), therefore, to the effect that everyone expected to discontinue making open-edge board when the licenses were signed, accords with the facts, whether there was any "agreement" to that effect or not. This definitely establishes that there was at least an "understanding."

E. Standard size und packaging

Two other moves were made to produce a uniform product. In its price bulletin of May 24, 1929 (Ex. 408, R. 6097), USG wrote: "The standard size of patented gypsum plasterboard are: 32- and 48-inch widths, and from 4-ft. to 12-ft. lengths, inclusive." Subsequently a more elaborate and detailed description of so-called standard sizes of board was provided (Ex. 7 to complaint, R. 89). So-called nonstandard or odd sizes could be manufactured, but the bulletin provides that they could only be sold at price differentials which in some cases amounted to as much as \$5 per thousand square feet (Ex. 7 to complaint, R. 93). The prescribed differentials are not only unrelated to the degree of variation from standard but are practically prohibitive.

The second move was to bring about a uniform method of packaging or "bundling" for lath and board. USG owned Birdsey patent No. 1,696,877 which related to a process for applying a gummed tape along the sides of a bundle of four or five pieces of lath. In the May 1929 agreements the purpose to force this type of bundle on the industry was made explicit: "It is expressly understood that licensee * * * will use *only* said bundle * * * and will not use any other bundle or method of bundling plasterboard * * *" (Ex. 3 attached to complaint, R. 52). When the November agreements were drafted:

this provision was omitted as probably no longer necessary, but it was provided that licensees should pay USG a royalty of ten cents (10¢) per thousand, "whether or not the bundles shall be made according to the claims set forth and claimed in said patents" (Ex. 6, attached to complaint, R. 75-76).³⁰

F. Basing points and uniform billing weights

The fixing of uniform mill base prices, the elimination of seconds and open-edge board, and the standardization program were important

³⁰ The court in Finding 71 (R. 4157) found that the license provisions charging a royalty on all bundling, regardless of whether the USG method was used, "do not establish an attempt to standardize by eliminating other methods of packaging," and in Finding 72 (R. 4158), that "the license agreements were not executed with an intent to standardize in respect to the bundling patents."

The court appears to have based these findings on the further finding that "no other method was available" (Fdg. 71, R. 4157). The findings, accordingly, do not negative the fact that the royalty provision would operate, as charged, to bring about uniform packaging, and the appellees must be deemed to have known that and so intended when they signed the license agreements.

On June 10, 1929, Brown wrote Avery concerning the bundling matter that so far as he knew, "our plan of bundling has been meeting our requirements" but "we are anxious to do what the Industry does so as to have a uniform product" (Ex. 312, R. 5861). After receipt of Brown's letter the provision requiring use of the USG bundling was dropped, but the royalty provision was nevertheless included in the November agreements. It is a fair inference that, contrary to the court's findings, the industry intended to bring about a uniform method of packaging board.

moves directed to the control of prices and the elimination of competition. A further move was the inauguration of a basing point system. The first bulletin handed out by USG to its assembled licensees at the Palmer House on May 23, 1929, as above-mentioned, named only seven points, but from time to time other basing points were added until in 1939 there were a total of 24 (Ex. 33, R. 4863). At all times, however, there have been board mills at places not named as basing points.⁴⁰

In order to obtain a uniform—and hence non-competitive—delivered price USG specified an arbitrary billing weight to be used by each licensee in calculating prices on rail shipments. The dealer price, in other words, was to “be the lowest combination mill price * * * and all rail freight from such mill to destination,” calculated on the basis of the specified uniform bill-

⁴⁰ For example, Wheatland, New York, where Ebsary has its mill, was not made a basing point until June 10, 1939. Compare Ex. 33, R. 4863 and Ex. 33, R. 4846. Lenci testified that Ebsary construed the bulletin basing-point requirement, to be a “freight equalization” system, Ebsary’s practice being to quote a price to dealers “based on the mill having the cheapest freight rate to the destination in question” (R. 2909). The latest bulletin in the record (Ex. 33, R. 4863), however, explicitly provides that prices “shall be the mill price listed below plus carload freight from producing mill to destination of the shipment.” Then follows a list of 24 “producing mills,” called in earlier bulletins *basing points* (Ex. 404, R. 6093). It will be noted, moreover, that this bulletin, while adding Wheatland as a “producing mill,” has omitted Laramie, Wyoming, and Loveland, Colorado, which were listed in the bulletin of April 1, 1938 (Ex. 33, R. 4846).

ing weights (Ex. 7 to complaint, R. 89). In addition the licensees were each to charge exactly the same stop-over, switching, cartage, and other extra delivery charges. The result was that each licensee charged identically the same price to the dealer, either absorbing an extra freight cost or charging the dealer with phantom freight, depending on the location of its mill."

The adoption of a uniform billing weight was necessary—if a uniform selling price was to be had—since different manufacturers made board of different weights. Griswold testified that American made a $\frac{3}{8}$ " board in 1920 weighing 2,000 to 2,100 pounds per thousand square feet (R. 478). The weight fixed by USG in the May 23, 1929, bulletin (Ex. 404, R. 6093) was 1,850 pounds. Then on May 25, 1931 (Ex. 33, R. 4623), the weight was reduced to 1,600 pounds; on July 23, 1936 (Ex. 33, R. 4757), to 1,400 pounds; on October 21, 1937 (Ex. 33, R. 4831), the weight was increased to 1,475 pounds; and in the last bulletin in evidence, that of June 10, 1939 (Ex. 33, R. 4863), the weight was still further increased to 1,525 pounds. Throughout these operations, if a manufacturer made a board lighter than the

"In Fdg. 18, R. 4143, the court below found that the price on board in USG's bulletins "was calculated on the basis of a mill base price plus freight from the nearest mill (freight-wise) to the point of destination." This finding implies that all mills are basing-point mills but the bulletins in evidence do not support it. See footnote 40.

uniform weight he would charge a phantom freight, if heavier, he must absorb the freight.

G. Truck deliveries and pick-ups

The delivery of gypsum products by truck presented a further problem to the industry which, as in the case of rail shipments, was handled in a manner to eliminate further competition between the appellees. In its bulletin of June 19, 1929 (Ex. 412, R. 6102), USG inaugurated a system of uniform delivered prices for board delivered by truck in designated areas. For example, $\frac{3}{8}$ " wallboard delivered in truck lots to dealers' warehouses in Brooklyn took a price of \$25.60 per M square feet, while truck deliveries in Nassau, Long Island, and Westchester counties were assigned a delivered price of \$26.35.

USG also inaugurated a new practice at this time (R. 2511) to fix the *size* of all truck loads. The minimum load which could be delivered to dealers in Brooklyn—at the bulletin price—was 10,000 square feet. In Westchester county the minimum load was fixed at 8,000 square feet (Ex. 412, R. 6102). Special truck rates were prescribed only for designated areas. The bulletins did not expressly forbid a licensee to deliver smaller quantities to a dealer in one load, or to deliver by truck outside of a designated area, but the only price designated by USG for such deliveries was the l. c. l. (less than carload) freight

rate. This rate, Lenci testified, would have made the price to the dealer "so high that nobody would buy" (R. 3064); he construed the bulletins in practical effect, therefore, to prohibit such deliveries.

The location and extent of trucking areas was obviously a matter of great importance to the appellees. The bulletin of June 27, 1931 (Ex-35, R. 5062), for example, designated only Niagara and Erie counties in the Buffalo area for truck deliveries. Thereafter National, which has a mill at Clarence Center, N. Y., arranged privately with USG for truck deliveries in the Rochester, Monroe County, area. On September 11, 1931 (Ex. 693, R. 6492), Baker of National wrote USG that "to protect our business"⁴² we are following the arrangement agreed upon, "but feel that a definite schedule of prices on truck deliveries should be laid down and the area defined in an official bulletin." A week later, on September 18, 1931 (Ex. 35, R. 5060), USG issued a bulletin adding Orleans, Genesee and Monroe counties to the Buffalo trucking area.

The minimum size of truckloads permitted in the Buffalo area was fixed by the bulletin of September 18, 1931 (Ex. 35, R. 5061) at 5,000 square feet of board, or at 7½ tons in the case of mixed loads. This limit of 5,000 feet in Buffalo, compares with the limit of 8,000 or 10,000 feet in

⁴² It will be noted that Baker was interested in protecting his business and not in providing pecuniary reward for the patentee's monopoly.

the New York area. From subsequent bulletins it appears that by "mixed loads" was meant "gypsum board and/or lath and other materials" (Ex. 38, R. 5234), or subsequently, "gypsum board and/or lath and other gypsum materials" (Ex. 38, R. 5231). The record is completely silent as to why USG prescribes the size of mixed loads made up, in addition to board, of plaster and other unpatented material.

The companion problem of how to handle so-called dealer "pick-ups" at mill or warehouse was discussed at the meeting between USG and its licensees on June 6, 1929 (R. 2538-9). Lenci testified that a statement was made that "it cost more at the mill, for instance, when a customer's truck backed in to be loaded with a small quantity of material, than would be the case in our usual course of business to take the material right from our kilns to the boxcar * * *". Thereafter USG proceeded to fix the permissible quantity of pick-ups. For example, the bulletin of August 12, 1932 (Ex. 34, R. 4981) read: "Minimum pick-up 5,000 sq. ft. board and/or lath." Later, on February 24, 1937 (Ex. 34, R. 4922), the amount was increased: "Minimum pick-up 7500/sq. ft. patented gypsum board products."

The consequence of these trucks and pick-up regulations has been that dealers throughout the Eastern area have been unable to buy at usual dealer prices less than 5,000 sq. ft. of gypsum

board (R. 2885). Moreover, it appears from a letter written by Lenci on May 6, 1932 (Ex. 438, R. 6139), that the reason for these restrictions was not solely to account for differences in cost of handling small orders. Lenci in that letter says categorically, and the statement was not qualified upon cross-examination (R. 6139), that one of the reasons for the selling policy was to "make the dealer carry a sufficient stock."

These restrictions, of course, also eliminated all temptation on the part of USG and its licensees to compete with each other on a purely service level by accommodating a dealer with a small order of board when he may have run short of certain sizes.

H. Classification of dealers

At the licensee meeting of June 6, 1929, the problem of how to classify dealers was raised (R. 2535). For example, were mail order houses to receive a 10% discount from the dealer prices, as had been the practice (R. 2535), or were they to be sold as dealers? Were "house wreckers", known as "bathtub yards", to be classified as dealers? And, should the industry continue to sell the Federal government at the dealer price on direct sales? Lenci testified that "I expressed my views" that mail order houses should receive no discount (R. 2536). On the question of "bathtub yards" Lenci could not remember, but "if I

took any position it would be that they were dealers" (R. 2537). In both cases Henning of USG agreed.

Henning further decided that, on direct sales, the government should be classified as a dealer (R. 2537). Lenci testified: "I don't remember what the comments were, but I believe everybody felt that was the right thing to do" (R. 2537). Under this policy the local dealer got nothing. On February 26, 1935 (Ex. 38, R. 5176), a bulletin was issued applicable to sales to the Federal Government for C. C. C. Projects, which provided for a maximum dealer commission of \$1.50 per M sq. ft. on such sales. Then on October 31, 1935 (Ex. 38, R. 5138), in the case of direct sales to the Federal Government for W. P. A. Projects, it was ordered that the government was to be charged an advance over the regular dealer price of \$2.50 per M sq. ft. on wallboard and \$1.25 on lath. The bulletin provided further that these advances could be paid to dealers by way of commission.

I. Elimination of jobbers

Prior to May 23, 1929, it was customary in the gypsum industry, as in the mason's supply business generally (R. 1555, 1568), for manufacturers to distribute their products through distributors and jobbers (Ex. 617, R. 6394). Lenci testified that plaster and gypsum products other than wallboard are still sold in that way (R. 2898).

The May 1929 licenses, recognized the practice but, *for the first time*, required that licensees obtain USG consent before selling "manufacturers of plaster or gypsum products, or jobbers of such products, who do not or may not manufacture gypsum wallboard * * *" (Ex. 3, attached to complaint, R. 77-78).

The price bulletin of May 24, 1929 (Ex. 408, R. 6097), provided as follows:

Minimum prices to Manufacturers and Jobbers of Gypsum Products—10% discount from minimum list prices as per our letter of May 23, applicable at all basing points.

The bulletin concluded with a request that: "You will please send us a list of the jobbers to whom you are selling patented board." At the licensee meeting of June 6, 1929, Henning of USG repeated the request and asked all those present to send him a list of the companies that were being sold as jobbers (R. 2534).

Ebsary replied on June 21, 1929 (Ex. 421, R. 6120), naming three jobbers or distributors: H. M. Coeyman Company, Newark, New Jersey; G. B. Raymond & Company, Long Island City, New York; Eastern Builders Supply Company, Baltimore, Maryland. American was insistent that it should keep its jobbers for; as Kling put it, "I feel as you do about their strangling us unless we have some protection" (Ex. 299, R. 5851). Later, on November 12, 1929, Kling asked Avery

for "your approval of our (4) jobbers"—The Fairmont W. P. Co., The Toledo P. P. Co., The Cleveland Gypsum Company, and Abbey & Co. (Ex. 181, R. 5330).

At some time not disclosed in the record the November agreement was drafted to read differently than the May agreement, and no consent was required in the case of jobbers (Ex. 6 attached to complaint, R. 78). Avery's reply to Kling as to the reasons for this (Ex. 182, R. 5332) is illuminating:

Fourth—You ask for our approval of your jobbers. Under paragraph 9 of the contract you have the right to sell jobbers (being those who do not manufacture but buy and sell plasterboard or gypsum wall-board in straight cars or in mixed cars with other building material and who do not sell at retail) without any approval from us. If the jobbers you name are regular jobbers as above stated, then you would have the right to sell the patented product to them. As to other manufacturers or wholesale distributors, then you must have our consent, this provision simply being to prevent the licensee from *defeating the license* by manufacturing for other manufacturers or wholesale distributors not within the jobber class and who may sell at any price they please as we have no right to control the re-sale price of persons to whom the licensee may sell the patented product.

By "defeating the license" Avery could only have meant *defeating price control*. In other words, since USG had no legal right to control the prices at which the 9 or more plaster manufacturers (called manufacturing distributors in the complaint) (R. 158) might resell board purchased from licensees, Avery thought it necessary to require a consent. The implication is irresistible that Avery intended, if it should ever develop that such manufacturing distributors were re-selling wallboard below the fixed dealer prices, to withdraw the USG consent, in order, as he said, not to defeat the license."

Avery defined jobbers exactly as they were described in the November license agreement (Ex. 6 attached to complaint, R. 78). But plaster manufacturers, i. e., manufacturing distributors, also were—and still are—jobbers, in that they buy board, in carload lots and resell to dealers at dealer prices. Why Avery saw the possibility of the "license" being defeated in the case of sales by the latter and not by the former is not obvious. Probably it was a maneuver to satisfy American that it could keep its jobbers. At all

"In Findings 84, 81 (R. 4160, 4159) the court below found that the "clause of the licenses forbidding sales to manufacturing distributors without the written consent of USG was not intended to control the prices of such distributors, nor was it so used." The court, in making these findings, appears to have overlooked Avery's express statement in Exhibit 182 (R. 5332) that the provision *was* intended as a means of controlling the resale price of manufacturing distributors.

events, on November 25, 1929, American signed up. Less than a year later USG issued the price bulletin of August 8, 1930 (Ex. 430, R. 6130), which provided:

Effective this date the price to jobbers and distributors is the same as the price to the regular dealer trade * * *

The obvious purpose and effect of Exhibit 430 was to eliminate jobbers, as defined in the November agreement, from the gypsum industry. "Jobbers could not buy in car lots at dealer prices and resell to dealers at those same prices. And

"The court below made three findings directed to the point that there was no "intent" or "agreement" or "understanding" on the part of appellees when the licenses were executed or later that "jobbers would be eliminated" or that the "jobbers discount" would be discontinued (Fdgs. 75, 77, 101; R. 4158, 4159, 4164).

The court in making these findings appears to have relied on certain general testimony of Lenci and others that they had no *specific* intent or understanding that jobbers would be eliminated (R. 2898). But the court overlooked the fact that the *broad* purpose of the appellees was "to organize the industry and stabilize prices" (Ex. 185, R. 5339). To accomplish that broad purpose they delegated to USG the power to price jobbers out of the market whenever USG saw fit. USG determined to eliminate jobbers for the reason, as the court pointed out in its opinion (R. 4085), that jobbers set up an "unfair artificial competition" with USG and the licensees. Moreover, when USG issued its bulletin (Ex. 430, R. 6130), the licensees acted aggressively in concert to carry it out with the end result that jobbers have been wholly eliminated (R. 2997, 2991). It is submitted, therefore, that whether or not there was specific intent at the time of the agreement there was subsequent understanding and cooperation.

dealers would not buy at higher prices when they could buy directly from a licensee at bulletin prices. Higgins, a successful general mason's supply jobber, formerly with National, when asked whether he had ever tried to get a board connection on a jobber basis, testified (R. 1574):

Well, having been in the industry for a period of nine years, I knew that I could not buy board and resell it at a profit as a jobber.

The uncontradicted testimony of Lenci and Tompkins (R. 2997, 1991) establishes beyond any question that jobbers have been eliminated. At Record 2997, Lenci testified:

Q. But there are no jobbers who buy at a discount from the manufacturer and sell to the dealer at dealer prices?

A. Not so far as our company is concerned.

Q. And you don't know of any in the industry?

A. No, not at the present time.

Q. And insofar as that constitutes being a jobber, those jobbers are eliminated?

A. Yes.⁴⁵

⁴⁵ The court below (Fdg. 100, R. 4164) found that, in spite of the bulletin leveling off the price to jobbers with that to dealers (R. 6130), "Many jobbers continued to buy board and were able to perform a proper jobber's function." In explanation of this, the finding continues in Lenci's own words (R. 2996-2997), "There were small dealers who * * * were not able to buy or store board in the minimum quantities in which the licensees were required by the bulletins to sell it. A jobber * * * having adequate warehouse

J. Control of manufacturing distributors

After "jobbers" were eliminated, the industry continued to sell board on a jobber basis to manufacturing distributors, i. e., plaster manufacturers who buy board and resell to dealers. In all cases USG first gave its revocable consent to the licensee (R. 6236). For example, on November 30, 1934 (Ex. 38, R. 5183), a bulletin was issued consenting that all licensees might sell at a discount to Oakfield Gypsum Products Corporation and to Connecticut Adamant Plaster Company. On November 8, 1935 (Ex. 545, R. 6236), Ebsary was permitted to sell at a discount to Structural Gypsum Division of American Cyanamid. Other special consents were given from time to time.

At the licensee meeting of November 15, 1932 (R. 2666-2667), USG raised the discount from the

space could, though he purchased at the dealer price, resell in small lots to such dealers at an advance, because of the service he thus rendered them."

The court in making this finding overlooked Lenci's further testimony, quoted above, which followed immediately. The court further completely overlooked the fact that jobbers had been defined in the November licenses and that what constituted jobbing, accordingly, was not open to question; as so defined, jobbers both "buy and sell" in straight cars or in mixed cars (R. 78). Moreover, the witness Higgins made it clear that the transaction described by the court as "a proper jobber's function" was not jobbing at all in the usual sense, but a relatively unimportant "warehouse business" (R. 1593). The court's finding that jobbers, in the customary sense in which that term is understood in the industry, have not been eliminated, has no basis. In any event the survival of one small class of jobbers would be immaterial.

initial flat 10% to 12½% on lath and 15% on board, where it has remained ever since. Manufacturing distributors, as plaster manufacturers, were potential board makers. Hansen of Oakfield testified that his company had from time to time considered starting a board mill (R. 3180-3181), since it was scarcely possible to sell plaster to a dealer unless his board requirements could be met at the same time. He further testified that the new discounts barely permitted his company to do business (R. 3181) and that it would have been economically impossible to sell below the established dealer prices. (R. 3187).

On July 20, 1933 (Ex. 38, R. 5210) USG notified its licensees that its consent to sell manufacturing distributors at the 12½% and 15% discounts would thereafter be "restricted to sales of patented board and lath to said manufacturers for resale to the dealer trade at wholesale, and is not to apply to such materials sold at retail." This meant, in plain language, that manufacturing distributors must confine their sales to dealers or have their source of supply cut off. Gallagher, New York Sales Manager of USG, was notified on July 24, 1933 (Ex. 785, R. 6583) to be on the alert for sales made by manufacturing distributors "other than at wholesale."

In making sales to the dealer trade, moreover, manufacturing distributors were expected to conform both to the USG prices and methods of dis-

tribution. Tompkins (R. 1979-1980) testified that he furnished his distributors with his dealer prices. Kellog of Connecticut Adamant testified (R. 3408) that he obtained the dealer prices from USG when selling its board as a distributor. Similarly, the distributors were expected to conform to the minimum quantity regulations for truck deliveries and pickups as prescribed by USG for its licensees.

For example, on June 9, 1932 (Ex. 440, R. 6142) Ebsary wrote USG that Structural, a manufacturing distributor, was violating the 5,000 sq. ft. minimum pick-up regulation. Structural, which was being supplied by Kelley, would sell 5,000 sq. ft. to a dealer in one lot and then permit the dealer to pick it up in small amounts rather than in one load as required by the bulletin. USG did not reply at once, whereupon Lenci wrote (Ex. 443, R. 6144) that Ebsary was losing some of his "old customers" and demanded that the matter "be taken care of." On July 16, 1932 (Ex. 442, R. 6146) Lenci became explicit:

* * * evidently Mr. Kelley is unable to control the actions of the Structural Company, and in as much as Kelley as a Licensee has to have your permission to sell the Structural as a Manufacturer below the Dealer's prices, we believe you will agree with us this permission should be withdrawn.

On August 1, 1932, Henning of USG wrote Lenci that: "This matter is being handled with the Kelley Plasterboard Company and we will advise you just as soon as we have their reply" (Ex. 444, R. 6147). Ten days later, on August 10, 1932, Gallagher, the New York sales manager of USG, at the request of Henning of USG, phoned Lenci concerning what had been done. According to Lenci, Gallagher advised him (Ex. 445, R. 6148):

that Mr. Kelley had personally notified Mr. Williams [of Structural] that no further variations from the license agreement would be permitted and that if it happened once more he would cancel his contract with Structural.*

It is clear, moreover, that should a manufacturing distributor sell below bulletin prices or on better terms, he would very soon lose his source of supply. Tompkins, of Newark, when asked

* On cross examination an attempt was made to weaken the force of the above exhibits (R. 2885). Lenci was led to explain that his complaint was not directed at Structural but at Kelley, that is, he was supposed to have thought that Kelley must be giving more than the usual 12½ to 15% discount, otherwise Structural could not have afforded to extend the small service of permitting dealers to pick up lots of less than 5,000 sq. ft. at one time. The explanation is not credible, as the cost of the extra service is obviously very small. Also, at this time Lenci believed the licensor had the legal right to control a distributor's sales (R. 8033), so that there was need to resort to such a roundabout explanation. The explanation, moreover, even if true, does not weaken the force of the evidence that pressure was actually brought to bear on Structural with the purpose and effect of forcing Structural to conform to the bulletin terms.

about what he would do in such situation testified (R. 1990):

A. I don't remember my exact words, but what I meant to convey was that if we were selling to any manufacturing distributor or jobber at a discount, and that jobber or distributor took our material and sold it at a lower price than we were willing or able to sell, to our own customers, we would not continue selling him.

Q. And that was exactly what Structural was doing in Philadelphia.

A. Exactly.

Q. So you refused to sell them any longer?

A. That is correct.

The evidence is equally clear that the manufacturing distributors understood fully that they must comply with bulletin prices and terms. McCormack of Structural, when asked if he was under any obligation to sell at his supplier's prices, testified (R. 3381):

I wouldn't say it was an obligation; it was good business sense to go along with those prices.

His reason was:

If we undersold our source of supply, and continuously did it, I don't believe we would have a source of supply very long."

⁴⁷ The court below, in Fdgs. 104, 105, and 106 (R. 4165), found that the defendants did not, by any of their operations, fix or control the resale prices of manufacturing distributors. It is submitted that when the above evidence is considered

K. Sales to other licensees

There have been a number of occasions when one licensee has purchased substantial amounts of board and lath from USG or another licensee for resale to its regular dealer trade (Ex. 271, R. 5799). For instance, in 1932 Certain-teed bought from USG its entire requirements of all types of board in the territory served by its North Holston mill (Ex. 241, R. 5413). C. O. Brown testified that all such board was sold at the same prices as that which it manufactured itself, that is, at USG bulletin prices (R. 1193, 1240).

The license agreements for so-called metallized board provide expressly that no licensee may manufacture and sell metallized board to another "without the written consent of Gypsum Company first obtained" (R. 4515). In 1940, for a period after Newark's board mill had burned down, Newark purchased from USG and other licensees with USG consent, all its requirements of board, lath, and metallized board at the usual manufacturing distributor discounts (R. 2026-2027). Tomkins testified that all such board was sold at

in the light of Avery's blunt statement (Ex. 182, R. 5332), not mentioned by the court, that licensee dealings with distributors had been put on a *consent* basis for the purpose of maintaining price control, no other inference can reasonably be drawn than that appellees intended to control resale prices and that resale prices were controlled. In fact, manufacturing distributors were even forced to comply with bulletin terms and conditions of sale. Fdgs. 104, 105, and 106 are, therefore, clearly erroneous.

USG bulletin prices. He explained his reason as follows (R. 2027):

Well, during this period we wanted to maintain our position as manufacturers of board as nearly as we could. We didn't want to destroy the price structure that we expected to work under when we were again in operation.

This practice to sell at USG prices was likewise followed by Texas and National in the case of perforated lath. National made lath not covered by the USG perforated lath patent, Roos patent No. 1,938,354, and for a period sold substantial quantities to Texas (R. 3470-3471). Both National and Texas sold such perforated lath at USG prices (R. 1594, 3471).

L. Board Survey, Inc.

With the general structure of its new distribution system established, the industry turned its attention to policing, in order to insure strict compliance with the bulletin provisions. In 1932 USG organized a wholly owned subsidiary corporation, Board Survey, Inc., to act as an enforcement agent. On March 4, 1932, USG notified its licensees that the company had been formed and invited them "to send in * * * all instances of violations of any of our * * * board license agreements which come to your attention * * * " (Ex. 432, R. 6132).

The procedure for hearing complaints was carefully stated (Ex. 432, R. 6132-6133). USG or any of the licensees making a complaint to Board Survey was to furnish "all the data you are able to collect evidencing the apparent violation." Board Survey would then make "a thorough check-up of all such reported violations" and "take such action as * * * necessary * * * to fully enforce our rights under license agreements * * * and to protect our rights and interests under our patents." In the next several years many complaints, some of which are discussed later herein, were filed with Board Survey and thoroughly checked up.

M. Licensee meetings

During the year 1932 USG conducted an audit of all of its licensees' sales of Gypsum board. It was authorized so to do by the license agreements (R. 77). According to USG the audit disclosed a great many violations, or supposed violations, of the license agreements. As a result (R. 2603), on October 17, 1932, USG held a licensee meeting at the Commodore Hotel in New York. According to Lenci, those present included Henning and MacLeish of USG; Neale of Atlantic; Kelley of Kelley Plasterboard; Ebsary, Hough, Lenci, and Diegal of Ebsary; Baker of National; C. O. Brown and E. G. Roos of Certain-teed; Black of American; and Holland of Universal (R. 2602). MacLeish, counsel for USG, conducted the

meeting. "He was very much perturbed at the number of violations of the terms of the license bulletins" (R. 2603). The Ebsary Gypsum Company, for example, was alleged to have violated the licensing agreement 711 times, involving about 6,700,000 feet of board (R. 2603). According to Lenci, MacLeish then "made the statement that if the situation did not improve, there were only three things to do: either to cancel the licenses; or for the United States Gypsum Company to institute damage suits against the licensees; or to eliminate the price control feature entirely from the licenses" (R. 2603).

No licenses were cancelled; no damage suits were brought; and the industry did not give up price control (R. 2605). On the contrary, the meeting proceeded to a long and detailed consideration of the alleged violations. As Lenci testified. "Well, the whole idea of the bulletins was new, and a great many of the matters embodied in the bulletins were not clearly expressed, we couldn't understand them, and we naturally had to have the bulletins clarified" (R. 3006). Or, as he testified earlier, "there had been a tremendous number of bulletins issued, piecemeal, and honestly none of us could be blamed for making mistakes" (R. 2614).

The licensee meeting of October 17, 1932 (R. 2603) and the several meetings held thereafter went beyond what was necessary merely to clarify

the bulletins. Several matters were brought up upon which there were no bulletin regulations. What the industry actually did at these meetings was to work out, concertedly, the details of the distribution system which had been established generally under the licensing plan. Some of these were incorporated into bulletins and became the written law of the industry. Among the topics covered were the following:

1. *Commission men*

At the meeting of October 17, 1932, for ~~ex~~ample, MacLeish brought up the licensees' practice of employing salesmen on a commission basis (R. 2613). He said that "the audit showed that these commission men, if they didn't have a good mouth, would be very apt to give part of their commissions away to the customer, and that therefore the employment of commission men was a bad practice" (R. 2613). Not only was it a bad practice, but it, he said, "would have to be discontinued" (R. 2613).

The members of the industry present made no objection. According to Lenci (R. 2613), "Well, there were very few commission men employed, and the ones who had them said that they would be glad to rearrange them and put them on a salary basis." One week later, on October 24, 1932, USG issued a bulletin (Ex. 38, R. 5221) which provided that it would be a violation of the license for any licensee to pay a commission

to a salesman even though he sold at dealer prices and did not split commissions with the dealer. Moreover, commission salesmen were not to be employed in any case "without the written consent of licensor."

At the licensee meeting of November 15, 1932, USG again brought up the subject, with a statement that commission men "must be cleaned up" (R. 2668). At this time Lenci objected that Ebsary would not make any change until Atlantic had done something about a commission man in its employ (R. 2668). At the next meeting, December 13, 1932, Henning said that "now all commission men had been cleared up * * * with the exception of Blanchfield and Parker" (R. 2672) employed by Ebsary. Lenci replied that they would be "taken care of." Thereafter Blanchfield was put on a salary basis and "we let Parker go" (R. 2672)."

2. *Dunnage*

Another matter brought up by MacLeish at the October 17, 1932, meeting related to dunnage (R. 2607). The complaint, according to Lenci, was "that the licensees were putting in an unusual number of boards as culls, for packing, which in

"On cross examination (R. 2857) Lenci testified that he did not understand the bulletin to outlaw commission men, as such, but only the splitting of commissions. But Lenci's own actions in putting Blanchfield on a salary basis, though he was not shown to have split commissions (R. 2895), indicates his real understanding (R. 3021-3022).

reality were first-class material and in a way were a rebate." MacLeish said the practice "would have to cease" (R. 2607). At the meeting of November 15, 1932, Lenci made a complaint that Atlantic, a licensee, was using an unnecessary amount of board as dunnage (R. 2659-2660). Whereupon Henning asked that each licensee mail to Board Survey a complete statement of the amount and kind of dunnage it used (R. 2660).

At the meeting of December 13, 1932, Henning announced that each of the eight licensees had made a dunnage report (R. 2680). The average was 610 sq. ft. per car and, according to Lenci, Henning then said that "as most of the companies were using between 500 and 600 square feet, that that would be considered a fair amount of board, a proper amount of board to be used as dunnage to properly pack the car" (R. 2680). The licensees were also "asked to use, as far as possible, narrow strips, that is, boards not over 12 inches wide, * * *" and whenever wider board was used it should be stamped "dunnage."

On December 22, 1932, USG issued a bulletin (Ex. 38, R. 5217) dealing with the matter. In later bulletins the regulations were further elaborated, and also made to apply to truck deliveries. For instance, it was later provided that all gypsum board used for dunnage "shall be plainly stamped in red on the face side of each board, showing the words 'Dunnage—Not to Be Sold'".

in letters at least 3" high, and be defaced, marred, diagonally scored or mutilated, and otherwise so marked that they will have no value and will be unfit for use or resale" (Ex. 37, R. 5099).

3. *Trade discounts and payments*

The subject of "discounts" was brought up by MacLeish at the October 17, 1932, license meeting (R. 2606). Previously, on April 12, 1932, USG had issued a bulletin (Ex. 38, R. 5242), in which it had said that "extending other than regular terms" to dealers or other buyers would be construed as a rebate and in violation of the minimum price provisions of the license. Some or all of the licensees, it was charged, had granted excessive discounts contrary to this regulation (R. 2606).

At the meeting on December 13, 1932, Henning brought the matter up again. Terms in the lumber trade often run 30, 60, 90 or 120 days, while in the cement, lime, and gypsum business shorter terms had prevailed. Lenci testified that "we didn't want to have—you see, at this time this was in the low part of the depression—we didn't want to have all our money let out on these long terms if we could avoid it, and we wanted to hold the gypsum end of the business into the 2 percent 10-day group, or 30 days net, rather than have it drop into the lumber classification. We were asked by the licensor not to offer these long terms as an inducement in order to make

sales" (R. 2682). Everyone present agreed with the licenser, for as Lenci said, "We all felt it was a good thing" (R. 2683).

The phrase "other than regular terms" in the bulletin was also intended to regulate the medium of payment. MacLeish, at the October 17, 1932, meeting complained that National had taken Chicago World's Fair bonds in payment for wallboard (R. 2612). Later, at the meeting of December 13, 1932, Henning told the licensees that they "were not to voluntarily offer to take notes, or offer to take trade acceptances, or offer to take bonds or other securities, in lieu of cash," as an inducement to make a sale (R. 2683). On July 29, 1933 (Ex. 782, R. 6580) Board Survey investigated a complaint that National had accepted certificates of deposit in a closed bank as payment.

How to quote prices in bidding on contracts was regulated. It was considered a violation of the license to deduct in advance the amount of the cash discount (Ex. 37, R. 5097). In making quotations to the U. S. Government, however, the regular minimum delivered price less 2% (cash discount) was to be used (R. 5097). In either case all bids were to be identical.

Nothing, it seems, was too small to regulate in order to eliminate all possible competition.

"It will be noted that Lenci speaks of uniform discount terms as "a good thing" for the licensees, and not as necessary to provide pecuniary reward to USG for its patent monopoly.

4. Warehousing and consignment sales

The bulletin of April 12, 1932 (Ex. 38, R. 5242), provided, without qualification, that the establishment or continuance of warehouses by a licensee at a dealer's place of business would be construed "as a rebate and in violation of the minimum price" provisions of the license. Likewise, "consigning of stocks" to a dealer was construed as a rebate. The effect of these two provisions was to prohibit dealer warehousing and to eliminate all sales on consignment.⁵⁰

Both matters were discussed by MacLeish at the licensee meeting of October 17, 1932 (R. 2609). Lenci testified that under the bulletins, as he understood them, a licensee was not permitted to rent warehouse space from a dealer (R. 2609, 3023, 6178). The "business reason" for the prohibition was "Because the thing was not done for the purpose of renting space, it was done for the purpose of influencing sales" (R. 2610). Likewise, shipments of goods to a dealer for sale on consignment was regarded by the industry "as very bad business" (R. 3024). And, it was Lenci's understanding, that that was the reason for the bulletin provision forbidding them (R. 3025).

⁵⁰ On May 31, 1932 (Ex. 453, R. 6155), Lenci complained to Board Survey that USG was shipping board on consignment to two dealers contrary to the bulletin. He testified that the practice gave a distinct competitive advantage to any manufacturer still employing it (R. 2877).

In the competitive era prior to May 1929, selling on consignment was a recognized industry practice. Henning reported that USG had in 1927 signed up some 230 consignment contracts with dealers (Ex. 619, R. 6403). During the first half of 1928, USG shipped over 20,000,000 sq. ft. of board to dealers on a consignment basis (Ex. 620, R. 6413). For the first quarter of 1929 USG had some 843 dealers on a consignment basis, who sold some 5,897,501 square feet of board (Ex. 621, R. 6416). The evident purpose of the bulletins was to eliminate this type of competition and put the entire industry on a "regular terms" sales basis.

5. Policing the jobber regulation

The matter of selling jobbers at a discount was brought up by MacLeish at the October 17, 1932 meeting. According to Lenci, "Well, as I recall it, my best recollections is that the discussion was that a bulletin had been issued which put jobbers and dealers on the same basis, but that in spite of that, some of the licensees had continued to sell jobbers at a discount below the dealer price" (R. 2611). There evidently was no particular discussion, "MacLeish made a statement that it was one of the things that would have to be corrected" (R. 2611).

At the next licensee meeting, on November 15, 1932, a number of jobber situations were discussed. According to Lenci, Kelley reported that Dusol was no longer "being sold at a special discount as a jobber, but was being sold as a

dealer" (R. 2667). Kelley also reported that "he would sell Paragon Plaster Company of Syracuse, the Paragon Plaster and Supply Company of Scranton, and the American Hardwall Plaster Co. of Utica as dealers and not as jobbers" (R. 2668-2670). At the December 13, 1932, meeting, Kelley complained that USG was soliciting business from one Cartier on a jobbing basis (R. 2672). Two or three other similar complaints were made (R. 2678-2679).

During this period and sporadically thereafter a number of complaints concerning jobbers were made to Board Survey. For example, on May 6, 1932 (Ex. 438, R. 6139), Ebsary complained that Certain-teed sold to Orin F. Perry as a jobber. Board Survey replied on August 18, 1932 (Ex. 451, R. 6153), that it had not completed its investigation. On November 28, 1932 (Ex. 471, R. 6173), Ebsary again complained about Perry and concluded with the statement: "This is in direct violation of the Bulletins eliminating sales of licensee board through jobbers and commissionmen." Again, on November 8, 1934, Ebsary wired to USG: "Lee Story must be eliminated as a jobber" (Ex. 502, R. 6197).⁵¹

⁵¹ The court below found that the exhibits discussed in the text "do not establish concerted action to 'eliminate' jobbers" but show only "that particular licensees had made arrangements with jobbers * * * in violation of the minimum-price bulletins" (Fdg. 102, R. 4164).

The exhibits mentioned by the court are not, of course, to be considered alone. When considered in the light of

6. Truck deliveries to the job

At the licensee meeting of December 13, 1932, a matter concerning truck deliveries to the job was discussed (R. 2683-2686). From the first, the bulletins had quoted only a price "to déalers' warehouses" (Ex. 412, R. 6102). Subsequent bulletins also restricted the licensees to use of their own trucks or those of independent owners; dealers' trucks could not be hired (Ex. 35, R. 5054). The complaint at this meeting was that some dealers, when receiving a truck delivery from a licensee, would pay the driver a small sum to carry the load on and deliver it at the job. Henning of USG took the position that this was actually the same as if "the manufacturer was making the job delivery" (R. 2686), and that where the licensees hired trucks "we would have to see that they abided by our regulations just as though they were our own trucks" (R. 2684).

So far as appears no further job deliveries were made by licensees. But the question did come up

all the evidence showing that jobbers were in fact eliminated, they establish clearly that the actions of Ebsary as set forth in the exhibits contributed to that end.

The latter part of the finding is curiously misleading. Lenci, on cross-examination, was led to explain that when he wired: "Lee Story must be eliminated as a jobber" (Ex. 502, R. 6197) he really meant that "Kelley must cease giving Lee Story a jobber's discount" (R. 2924). Obviously, whichever reading is adopted, it does not alter the fact that pressure was being brought to eliminate Lee Story as a jobber, and that he was eliminated. The finding is, accordingly, either immaterial or clearly erroneous.

later in the case of manufacturing distributors. On November 17, 1937, Tomkins, of Newark, a licensee, wrote Oakfield, its manufacturing distributor, as follows (Ex. 380, R. 6067):

I had luncheon yesterday with Harry McCormick, and he told me there had been a good deal of excitement among the dealers in Philadelphia several days ago owing to the fact that a shipment of Oakleaf Lath had been delivered directly to the job at 52nd and Spruce Streets. Will you please investigate this matter, as I think it possible we may be called upon for some explanation. I am sure that neither you nor any of your affiliates would knowingly make direct job deliveries in the areas where they are not permitted, and I am simply passing this on for your information.

Thereafter a formal complaint was made by Board Survey (Exs. 381, 382; R. 6068, 6069); Tomkins transmitted it to Oakfield for report (Ex. 383, R. 6070); Oakfield replied explaining the situation (Ex. 384, R. 6071); and on January 3, 1938 (Ex. 385, R. 6072), Tomkins reported to Board Survey.

Under date of May 17, 1938 (Ex. 387, R. 6074), Bartlett of USG wrote Tomkins in connection with another complaint that a manufacturing distributor was delivering directly to the job:

In further connection with my memo of the 5th instant advising you of apparent

violation of trucking regulations, I have been informed that Structural Gypsum Co., and Newark Plaster Co. (Kelly Cork Lath) are making a regular practice of delivering material direct to jobs.

The fact that in both of these cases Tomkins was able to deny that any violation took place does not negative the fact that the direct to job trucking restriction was being strictly policed and enforced and with the full approval of USG.

7. Control of advertising

The advertising policies of the licensees also came in for discussion at the meeting of October 17, 1932 (R. 2607). MacLeish complained that "a great many of the dealers were demanding that the licensees buy advertising matter, or paint fences for them," or decorate their offices, or furnish materials with which to fix up their offices, and things of that kind * * * without charging for it" (R. 2607). MacLeish said, according to Lenci, that such "advertising policy would have to be corrected" (R. 2607).

At the meeting of November 15, 1932, someone complained that National had given away seven boards to Feldman Lumber Company (R. 2662). Lenci explained, "That was a complaint in con-

²² "A dealer would decide that he wanted to repaint his whole place, fences and everything else, and on the fence there would be a small sign of one of the manufacturers, but the manufacturer would have to spend the money to do the whole job" (R. 2608).

nection with the matter of advertising, that is, giving away boards for completing work in a customer's office." (R. 2662). On November 21, 1932, Board Survey investigated National's complaint that Universal had donated \$100 to a dealer "for their ball club" (Exs. 779, 780, R. 6578, 6579). In the next few years a number of similar complaints were made.

The matter of advertising on dealers' fences, for example, gave trouble. On May 21, 1935, someone complained that Certain-teed had allowed a Chicago dealer \$120 to paint a Certain-teed sign extending 65' along the dealer's fence (Ex. 770, R. 6568). Certain-teed replied that its Sales Department had "misinterpreted our advertising policy," but pointed out that the sign replaced a similar one advertising USG products (Ex. 771, R. 6569). On June 14, 1935 (Ex. 772, R. 6570), Certain-teed was charged with painting a sign 8' x 8' referring exclusively to its products in front of a Des Moines, Iowa, dealer's office. And a year later, on June 6, 1936, Certain-teed was called to account for granting an allowance to a West Virginia dealer for painting a sign advertising Certain-teed products (Exs. 774, 775, 776, R. 6572-6576).

On May 10, 1935, Board Survey sent a letter to all of the licensees asking for "a statement of your policies" regarding "advertising allowances, painting dealers' signs, donations of patented

gypsum board for dealers' offices, donations of carpenters aprons or the sale of such below cost, and concessions of a like nature" (Exs. 558, 719, R. 6249, 6523). Thereafter, in its bulletin of September 16, 1935 (Ex. 37, R. 5114), USG provided broadly that minimum prices must not be reduced "by allowance for any other reason whatsoever." In its bulletin of February 6, 1939 (Ex. 37, R. 5093), the licensees were expressly forbidden to grant "allowances for advertising or other purposes," as constituting rebates.

N. Exclusion of Cardiff Gypsum Company because of price cutting on plaster

The Cardiff Gypsum Company has for many years owned gypsum properties in the vicinity of Fort Dodge, Iowa, and operated a plaster mill at that place (R. 3229). Its plaster and other related products are widely sold throughout the middle west (R. 3229). The company has at no time manufactured gypsum board or lath (R. 3229). Its position in the gypsum industry has thus long been substantially that of Oakfield Gypsum Products Corporation, Connecticut Adamant Plaster Co., and the other manufacturing distributors named in the bill of particulars to the complaint (R. 158).⁵³

⁵³ Cardiff could not be named in the bill of particulars as a manufacturing distributor since it had never been permitted by the industry to buy board at the general industry discount.

In June 1933, Sensibar of Cardiff asked Holland of Universal "whether we might not make arrangements so that Cardiff would be sold board on the customary industry basis" (R. 3237). Sensibar meant by this at the "discount of 15 percent on long board and 12½ percent on lath" applying in the case of manufacturing distributors (R. 3238). Holland stated that the matter was one requiring USG consent. Later he took the matter up with USG, but was unable to get their consent. Holland explained the USG action, according to Sensibar, as follows: "He told me that there was a general impression in the industry that Cardiff had been cutting prices on gypsum plaster; that he doubted, under those circumstances, whether we could make a connection to get board" (R. 3238).

During the summer of 1933 Sensibar saw Henning of USG and explained that the status of Cardiff had changed due to changes in stock ownership, and expressed the hope that the company "would be treated a little differently than they had been in the past" (R. 3240). In reply, "Mr. Henning confirmed the fact that it was the impression around his organization that Cardiff had been a price-cutter in the plaster field, and that this was not a very propitious time to talk about such a matter as I wanted to discuss; but that after a little experience with the new policy of Cardiff, the situation might be better" (R. 3241).

In the course of the next several years Sensibar tried to buy board at a discount from American, in 1933 to 1936 (R. 3241-3245, 3257-3259); Certain-teed, in 1933 (R. 3245-3247); National, from 1936 to 1938 (R. 3260-3270); in 1939, from Eb-sary (R. 3291-3293). In the case of American, for example, he pointed out to Black "that it ought to be a very good thing for his company, especially since our sales territory reached out a good deal farther than his sales territory did, and in that way that it might increase his business immeasurably" (R. 3243). Black was in full accord with this argument (R. 3243). In each case, however, USG refused to give its consent.

Sensibar had a further conversation with Henning in 1935 with a view to obtaining board at a discount from USG (R. 3252). Henning's answer again was the same: "that there were people in his organization who were still not willing to believe that we would sell, or continue to sell, plaster at the going prices" (R. 3252). Then in 1938 he saw Keady of USG and told him that Cardiff had "adhered to the sales practices established by USG" and that "it simply wasn't a healthy thing for a large company, dominating that kind of a situation, to keep a small competitor from having the same recognition as other people" (R. 3265). Sensibar, shortly after, discussed the matter with Knode, President of USG, and Cardiff was then finally refused the right to buy board at a discount (R. 3268).

O. Control of plaster prices

The Cardiff evidence, related above, admits of only one inference, that USG and the gypsum industry sought to maintain a stable price for plaster, as well as for board. In fact, as pointed out earlier, it was assumed from the outset by Avery that if the board market could be improved and stabilized it "naturally would follow" that plaster prices would likewise be improved and stabilized (R. 622). The court below found that there was, in fact, an "increase in price of plaster and miscellaneous gypsum products over the price during the 1927-1929 price war * * *" (Fdg. 94, R. 4162).⁵⁴

The industry took positive measures to insure that plaster prices would be stabilized. Gypsum board and lath is sold to dealers in combination with plaster and other products. The industry very early

⁵⁴ The court further found that the defendants did not "raise, maintain, or stabilize" the prices of plaster by any "device" or "action" or by any of their "operations under the license agreements" (Fdg. 94, R. 4162).

This finding completely ignores not only the evidence as to Cardiff referred to in the text, but the basic point that everyone understood that by getting together under the board licenses the prices of plaster and related products would improve (Ex. 141, R. 5293). Moreover, the evidence discussed in the text concerning the bulletin price rebate provisions (Ex. 37, R. 5092) and the Board Survey policing activities show conclusively that the defendants did employ various devices to stabilize prices on plaster. The finding is, therefore, clearly erroneous.

recognized, moreover, that any variation in plaster prices would have a direct bearing on the sale of board. If board prices were to be stabilized, therefore, the price of plaster and of other products customarily sold with board would likewise have to be stabilized (Ex. 147, R. 5298).

One of the first instances of industry control concerned a sale by National of board in combination with a quantity of fiber insulating board, called Maftex. Ebsary complained at the licensee meeting of November 15, 1932, that National "in trying to make a sale of gypsum board to Axinn Brothers, were maintaining the price of gypsum board but quoting an unusually low price on the Maftex board which was, in effect, unduly influencing the sale" (R. 2661). The matter was thereupon turned over to Baker of National to investigate, (R. 2661). In the next several years many such complaints concerning plaster and other products sold in conjunction with board were made to Board Survey.

For example, on June 15, 1933, Board Survey wrote Ebsary that one of its dealers had sold board at a price which would "hardly seem possible if your sales of patented board had been made at the licensor's minimum price," and that "It is further alleged that your sales of plaster to this firm have been at less than the market price, same being made so as to reflect to this customer a lower price on its purchases of patented board

than the licensor's minimum price to you" (Ex. 494, R. 6189).

Ebsary replied on June 20, 1933 (Ex. 495, R. 6190), that its sales of board had been strictly in accordance with the bulletins and further that, "Our sales of plaster to this company are made on the same basis as the prevailing prices made by our competitors for similar business and are not made by us with the intent to influence board sales."

A summary of a number of other typical complaints investigated by Board Survey, in which it was charged that prices had been cut on plaster and other products in order to influence the sale of board, follows:**

In Exhibit 499 (R. 6194), dated June 13, 1933, USG complains to Board Survey that Ebsary is cutting prices on plaster; in Exhibit 497 (R. 6192), Board Survey writes Ebsary and asks for an explanation; in Exhibit 498 (R. 6193), Ebsary replies and denies price cutting.

In Exhibit 500 (R. 6195), dated April 24, 1934, Board Survey complains to Ebsary that Ebsary is cutting prices on "other

** In addition to the exhibits summarized, the following also relate to Board Survey complaints that USG or one of the licensees was cutting prices on plaster, other unpatented gypsum products, roofing material, insulating board or other commodities (Exs. 703 thru 708, R. 6501-6506; Exs. 710, 711, R. 6508, 6509; Ex. 713, R. 6511; Ex. 731, R. 6530; Exs. 733 thru 745 (except 740), R. 6532-6545; Exs. 748 thru 754, R. 6547-6553; Exs. 760 thru 769, R. 6559-6567).

commodities"; in Exhibit 501 (R. 6196), Ebsary replies denying cutting prices on board and states that the "other materials were paid for at the prices prevailing in the New York market."

In Exhibit 727 (R. 6527), dated June 13, 1933, USG complained to Board Survey that Certain-teed was selling plaster at less than its regular price.

In Exhibit 729 (R. 6528), dated November 14, 1932, Board Survey complains to Certain-teed that it is cutting the price of plaster; in Exhibit 730 (R. 6529) Certain-teed replies that the board was sold at Bulletin prices "and the other products in the car were priced at our regular schedule."

In Exhibit 746 (R. 6544), dated April 24, 1934, Board Survey complains to Certain-teed that it sold a mixed car of board and "other gypsum commodities" and that it cut prices on the other gypsum materials; in Exhibit 747, (R. 6546) Certain-teed replied that the plaster was sold at \$1.00 per ton higher than other manufacturers were charging for it.

In Exhibit 758 (R. 6557), Certain-teed complains to Board Survey that National was cutting the price on board and "other items" in a mixed car sold to a Kentucky dealer; in Exhibit 759 (R. 6558), Board Survey demanded from National "a verified statement from you fully reporting your sales of such wallboard" covering a

period of six months and "including any and all allowances then or subsequently made effecting such shipment."⁵⁶

The bulletin provision relative to price cuts on plaster and other materials is as follows:

Rebates, Allowances, Etc. Any sale of patented products, though ostensibly made at or above the minimum price established by licensor, will nevertheless be considered a violation of the provisions of the license if licensee directly or indirectly reduces the actual price charged by licensee below such minimum * * * *by reducing the price of other products* * * * (Ex. 37, R. 5092).

⁵⁶ The court below in Findings 96 and 97 (R. 4163) found that the exhibits there mentioned involved complaints that Ebsary or certain other licensees had violated the minimum price on board through the device of "giving away plaster" or other products to a dealer, "and do not establish that defendants or any of them raised, maintained, or stabilized the prices of unpatented materials." These findings represent a complete misreading of all of the exhibits mentioned by the court except Exhibits 489-493, and these five exhibits related to but one isolated complaint. None of the complaints, except as noted, had to do with a charge that plaster or other commodities were being *given away*, or sold at an abnormally low price; on the contrary they all had to do with charges that Ebsary or some other licensee had *sold* plaster or other unpatented commodities at less than the established or market price.

It is submitted that when these exhibits are read in the light of the other evidence in the case they establish affirmatively that the defendants did raise, maintain, and stabilize the price of plaster and other materials as charged in the complaint.

The witness, Lenci, testified that he knew of no "agreements" or "prior understanding, oral or written, that certain prices would be established" for board, "and what those prices would be" (R. 2992). But he understood fully that the license agreement itself would operate to stabilize board prices (R. 2992). Similarly, Lenci testified that there was no "understanding" or "agreement" with respect to what price he should quote or charge for plaster (R. 2993). But Lenci understood from the beginning that he would not be permitted to sell plaster in order to influence board sales (R. 2993).

When asked specifically whether the result would not be, in a measure, to stabilize his plaster prices, Lenci admitted, "It might have that effect, yes" (R. 2993).⁵⁷ Prior to 1929 Lenci said he

⁵⁷ The court below found that there was at no time an "understanding" among USG and the licensees that prices on plaster or any unpatented gypsum products would be stabilized, raised or fixed and that the license agreements were not executed with that intent (Fds. 56, 73, and 94; R. 4154, 4158, 4162).

Lenci's testimony makes it clear, contrary to the court's finding, that he understood that the signing of the license agreements would have a tendency to stabilize both board and plaster prices. Blagden (Ex. 185, R. 5339) pointed out to Avery that the licensing scheme would enable Avery "to organize the industry and stabilize prices." Griswold, in Exhibit 141 (R. 5293), put the matter this way: "* * * There is no question but that if the Wall Board market were fixed up the Wall Plaster market would automatically be affected at the same time." See also R. 622.

Holland of Universal understood that the license agreements would have a stabilizing effect on plaster prices. In

could make any change in plaster prices that he saw fit to influence the sale of board (R. 2994). He described the situation thereafter as follows (R. 2995):

Q. And subsequent to that, you could not make an adjustment in the price of plaster for purposes of influencing the sale of board; isn't that correct?

A. That is correct, but I don't know where you would draw that line as to how much of a cut in plaster was made in order to sell the plaster, and how much of the cut was for the purpose of influencing the board sale. I couldn't tell you where that point would be.

Q. Well, I wouldn't know, either. But the bulletin—and I refer to Government's

Exhibit 147 (R. 5298) he stated: "I am afraid nothing can be done toward stabilization until the board matter is entirely out of the way. I believe that Mr. Avery has been very definite in a statement to that effect * * *." At R. 909-910, Holland was asked what he meant by the term "stabilization," as used above, and his reply was, "* * * I would assume it had reference to the hope that the downward spiral of prices in the gypsum industry would stop."

Certain-teed and National understood that the agreements would stabilize plaster prices. In Exhibit 203 (R. 5368), Walker of Certain-teed is quoted as saying that, "* * * Brown would not be willing to take out a license agreement with USG on board unless it carried with it a general clearing up of unsatisfactory conditions of all gypsum products. * * *." In Exhibit 200 (R. 5362), a National board of directors minutes, it was recorded "* * * that the United States Gypsum Company has been working on a plan to stabilize the Gypsum Industry * * *."

In the face of such unequivocal evidence the court's findings are clearly erroneous.

Exhibit 37, page 923—doesn't make any distinction as to whether it is large or a small reduction in plaster prices which might influence the sale of board?

A. I know that.

Later, in Lenci's testimony he made it clear that he was largely influenced by the USG prices on plaster in setting his own prices. "We would have to be, *it would be the condition of the market*. We couldn't get more, and we naturally wouldn't want to sell for any less" (R. 3054). When this testimony is considered in the light of the fact that Board Survey was actively policing plaster prices and all provisions of the bulletins, the inference is irresistible that appellees have controlled the price of plaster and other unpatented gypsum products."

The court below in Finding 19 (R. 4143) found that "During the periods when price bulletins were sent out by USG to its licensees, each licensee, in the main, sold gypsum board manufactured by it *at the prices and upon the terms and conditions* stipulated in the bulletins." This

⁵⁸ The licenses all contained a clause giving USG a right at any time "to inspect the books of account and records" of its licensees (R. 77). It is obvious that this right gave USG power to check up directly on any possible variation in the price of plaster or other products sold in conjunction with board. In 1932 a searching general audit was made of all the licensees' books and operations, as above discussed. A summary of the matters covered in the audits in 1934 is set out in Exhibit 549 (R. 6241-6242).

finding sets at rest any question of fact not only as to whether board was sold at ostensibly correct prices, but as to whether all the bulletin *terms and conditions* as above discussed were obeyed by the industry. Since the bulletin (quoted *supra*, p. 156) specifically prohibits reducing prices on board, "by reducing the price of other products," this finding as to compliance with the conditions of the bulletin in itself shows that prices of plaster and other unpatented Gypsum products were stabilized and controlled by appellees to the extent that they came within the scope of this provision.

SPECIFICATION OF ERRORS TO BE URGED

Appellant specifies as errors to be urged each of the errors assigned (R. 4178-4186) except numbers 8 through 11 (R. 4179). In substance, these assignments present the questions enumerated under the caption "Questions Presented" (*supra*, pp. 2-4) and, in addition, challenge all or part of each of the following Findings rendered by the court below: Numbers 11-12, 16-18, 24-30, 35-37, 39-40, 43, 53-54, 56-59, 61, 64, 66-67, 69, 71-75, 77, 80-81, 83-87, 89-91, 93-97, 99-102, 104-107, 109-110, 116-118.

SUMMARY OF ARGUMENT

I

— A. A combination among all the members of an industry, being erstwhile competitors, to organize the industry and stabilize prices by means of

patent license agreements containing price fixing provisions is unlawful. Price fixing combinations are unlawful *per se*. It is well settled that though the means employed by the combination to fix prices be lawful when looked at as isolated transactions, they may nevertheless be steps in an unlawful scheme or conspiracy. Patent licenses stand on no different footing. *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20; *United States v. Masonite Corp.*, 316 U. S. 265. In *Bement v. National Harrow Co.*, 186 U. S. 70, and *United States v. General Electric Co.*, 272 U. S. 476, the Court was not concerned with an industry-wide program designed to fix prices and eliminate competition. Each merely held that the license contract before the Court, when viewed as an isolated transaction, was not unlawful.

B. The evidence viewed as a whole and in context undeniably establishes the existence of such a conspiracy. In 1926, before any license agreements had been signed, Blagden of Beaver told Avery that USG, by virtue of its ownership of the Utzman patent, had an opportunity, by getting general industry recognition of its patents, "to organize the industry and stabilize prices" and thus "avoid the necessity of a reduction * * * of current prices to meet competition." In addition, Blagden offered to induce competitors to become licensees under USG's Utzman patent. Therafter, Blagden and Gris-

would, with the knowledge and approval of Avery, engaged actively in promoting industrywide licensing with price control. Their activities, supplemented by the assistance of others, resulted in a number of licenses being taken out under the Utzman patent between 1926 and 1929. In the latter year, at the height of a bitter price war and eleven weeks before the Utzman patent expired, substantially all of the existing licensees and those who had not yet become licensees met in Chicago with Avery. At this meeting all of those who were then manufacturing the competing open-edge board, except American and Kelley, became licensees under the Utzman patent. Avery then handed out the first of a series of so-called price bulletins which raised prices and established an elaborate non-competitive pattern of distribution for the industry.

Prior to this time some of the prospective licensees had questioned the advisability of signing licenses under the Utzman patent, since it would shortly expire and price control could not be maintained thereafter. Avery advised them that if the plan could not be worked out under the Utzman patent, there were other patents available. Holland actively promoted the plan in order to improve financial conditions in the industry. At the May 1929 meeting, Avery advised the licensees of rights which USG proposed to acquire by patents on so-called "foam" board and suggested that the industry take out licenses

with price control. These patents were in interference and their issuance was delayed. Avery then purchased from Universal the Haggerty "starch" patent, a narrow improvement patent of doubtful validity. Thereafter all competitors became licensees under this patent and the Roos "foam" applications. The drastic regulation of the industry which had been begun in May was continued to the extent that every competitive factor has now been eliminated from the industry.

The finding of the lower court that the evidence did not establish a conspiracy to fix prices was largely influenced by an erroneous interpretation of the applicable law in that it was of the opinion that the conspiracy would be unlawful only if the licenses were "sham"—that is, not meant to be adhered to. In addition the court erroneously held that declarations were not admissible against all defendants until the unlawful nature of the conspiracy, as well as the fact of combination, had been proved by other evidence. Both because of and apart from these considerations, the finding as to the lack of evidence to show a concerted plan to fix prices and eliminate competition is clearly erroneous.

II

Appellees have gone beyond anything sanctioned by the *General Electric* case in basing price control on mere process or narrow improvement patents.* In that case the patents "covered com-

pletely" the superior tungsten filament incandescent lamp and it was conceded gave the patentee "a practical monopoly of the manufacture and sale of incandescent electric lamps". The so-called principal USG patents—the Utzman closed-edge patent which expired in 1929, the Haggerty starch patent which expired in 1941, and the three Roos foam patents the last of which expires in 1954—are at most narrow improvement patents containing article and process claims. The Haggerty patent did not claim a new or superior product, but merely a means to promote adhesion between the paper liners of the board and the core; the Roos patent claimed a somewhat lighter board.

Under the rule announced in the *General Electric* case price control must be shown to be "normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly". This means that price fixing must be proportioned to the contribution of the patent, and should be allowed, if at all, only where the patentee's invention is coextensive with the article sought to be subjected to price control. Clearly a narrow improvement patent, of which there may be many relating to a single marketable product, could not warrant control of the completed article. This Court has never held that a minor improvement in an old article of commerce will justify price control; on the contrary in *Katzinger Co. v. Chi-*

cago Metallic Mfg. Co., 329 U. S. 394, 400, this Court has recently adverted to "the broad public interest in freeing our competitive economy from the trade restraints which might be imposed by price fixing agreements stemming from narrow or invalid patents". In the analogous infringement situation, the Court has consistently denied the holder of such a patent the right to recover from an infringer the entire profits derived from the sale of the article to which the patent relates. As to process patents, price control of the article made by the process is clearly not justified inasmuch as the patent does not cover the article produced. As the lower courts have repeatedly held, the patent grant may not be extended to allow the patentee to fix prices on the unpatented article produced in whole or in part by use of the patented process.

III

The *General Electric* case does not authorize the complete elimination of competition at all levels which appellees have carried into effect here. There the Court did not pass upon the reasonableness of the various regulations involved in the *del credere* agency plan of distribution before it. The question passed upon was whether a licensor may ever fix his licensee's prices, not whether the particular prices and methods of sale were reasonable.

Appellees' operations under the licensing arrangements, including the price bulletins, do not meet the test laid down in the *General Electric* case, that they be "reasonably and normally adapted to secure pecuniary reward" to USG for its patent monopoly. In active competition during the years 1926-1929 the Utzman closed-edge board and Haggerty starch board dropped in price from \$30 per thousand to \$20 and below. This established the actual value of the so-called patented board while it was in competition with unpatented open-edge board. After the agreements were generally signed in 1929 and competition was eliminated, the price was rapidly pushed up to a high of \$28.50 in 1934. Both USG and all of its licensees, therefore, obtained a profit not due to the patentee's monopoly, but to the elimination of competition in the industry. Appellees also have eliminated No. 2 board and discontinued sale of open-edge board and seconds. Sizes have been stabilized. Packaging has been made uniform. A basing point system, with uniform billing weights, has been established. Truck and carload sizes have been regulated; deliveries to job sites prohibited; dunnage is prescribed; these, and a great many other things have been done with the object in view of eliminating competition. It is submitted they have only a remote relation, if any, to securing pecuniary reward to USG for its patent monopoly. In ad-

dition jobbers and commission men have been eliminated; the resale prices of manufacturing distributors have been controlled; both USG and the licensees have subjected themselves to policing by Board Survey; and the prices of plaster and other unpatented products sold with board have been stabilized. In so doing appellees have attempted to extend their patent grant over things not included within its terms and hence their actions are unreasonable and not sanctioned by the *General Electric* doctrine. Clearly the totality of all these things goes far beyond anything approved in the *General Electric* decision.

IV

If the regulation of the gypsum industry disclosed in this case is sanctioned by the holding in the *General Electric* case, we submit that case should now be re-examined and overruled, for the reasons stated in the *Line Material* brief (No. 8, this Term), supported by the following considerations illustrated by this case.

A. The *General Electric* test is uncertain and difficult of application. It has been held not to go so far as to sanction all license conditions, even though they return pecuniary reward to the licensor. The conditions imposed must be "normally and reasonably" adapted to secure pecuniary reward for "the patentee's monopoly." Where, as here, an entire industry of erstwhile

competitors has been licensed, there is no possible way in the ordinary case of determining whether the royalty, the price which the public must pay for the product, or the methods of sale are only such as are "normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly." The Court, it is submitted, should therefore abandon any attempt to assess "reasonableness" for the reasons stated in the *Trenton Potteries* case. The present rule is both difficult of administration and affords no certain guide for lawful conduct.

B. The facts of this case establish that the rule of the *General Electric* case inevitably leads to consequences of a sort condemned by the Sherman Act. Licensees have every incentive to bring others into the combination to eliminate competition and make price control effective. When patents are offered with price control the importance of the patent is of secondary consideration. And, once an industry embarks on a program of stabilizing prices there is no logical stopping point short of complete regimentation, such as has come to exist in this case. It is not enough to declare that such action goes too far; the harm will often be done before corrective action can be taken. A rule having such potentialities for harm, it is submitted, should be abolished, particularly since it rests on no positive foundation in patent law.

C. Price control further tends to defeat the purposes of the patent law. In the present case the appellees are reasonably assured of a non-competitive profit until at least 1954, when the third Roos patent expires. The principal incentive to develop new and better products has been eliminated. Moreover, this case shows that narrow and doubtful patents are given currency. Licensees agree not to contest validity; they have little incentive to do so, since that would upset the price control arrangement. In the present case it was usual until 1929 to contest the validity of industry patents, or to attempt to patent around them. Since that date there has been no patent litigation, and none of the patents in this case, with the exception of the early Utzman patent, has ever been litigated. The Court has, in the public interest, modified the long standing rule that a licensee may not question his licensor's patents in order to prevent illegal price fixing schemes from being based on invalid patents. The Court should now strike at the root of the evil and declare all patent license price control to be illegal.

V

The Government in an antitrust proceeding may show the fact that the patents upon which a price fixing combination rests are invalid. A price fixing combination based upon invalid patents is illegal *per se*. *Sola Electric Co. v. Jefferson Elec-*

tric Co., 317 U. S. 173. If, as this Court has held, the public interest requires that a private litigant be permitted to show patent invalidity to relieve the public of unlawful trade restraints based on such patents, despite the private law principles of estoppel, it is clear that the Attorney General may do so in this proceeding, since he is charged by Section 4 of the Sherman Act with the duty to bring proceedings in equity to protect that public interest. The *American Telephone* case is not an authority to the contrary and, in fact, actually recognizes that the Government may properly contest the validity of a patent "when it is necessary in order to enable it to discharge its obligations to the public." To permit such a showing in a proceeding under Section 4 is not the equivalent of a suit for a judgment declaring the patents invalid and does not constitute the exercise of an appellate jurisdiction over the Patent Office. *Becher v. Contoure Laboratories, Inc.*, 279 U. S. 388.

Finally, it is submitted that within the holding of *Slawson v. Grand Street R. R. Co.*, 107 U. S. 649, this Court should now find the article claims of the Roos "foam" patents to be invalid. Roos and USG admitted before the patents were issued that "porous" or "cellular" gypsum wall board was old in the art. The article claims of the Roos patents therefore either claim an old product or are not stated in clear and precise terms as re-

quired by the holding of this Court in the *Wabash* case. In either case they are invalid and it "ill becomes" an equity court to permit appellees to justify their price fixing arrangement upon such patents.

ARGUMENT

I

APPELLEES, BEING ERSTWHILE COMPETITORS, ARE ENGAGED IN AN UNLAWFUL CONSPIRACY TO ORGANIZE THE GYPSUM INDUSTRY AND STABILIZE PRICES BY MEANS OF COMMON PRICE-FIXING LICENSE AGREEMENTS

The Government's position is that, even if it be assumed that under *United States v. General Electric Co.*, 272 U. S. 476, a patentee may in some circumstances lawfully fix a licensee's prices, this does not protect an agreement among members of an industry by which a patent licensing system with price fixing is created and maintained for the purpose of stabilizing prices and eliminating price competition. If an object of those who combined to fix prices through patent licenses is price control and not merely protection of the patentee's right to reasonable reward on his patent, the combination is unlawful. *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, discussed, *infra*, pp. 182-184, in itself is sufficient authority for this proposition.

In the present case we submit that the evidence demonstrates that the purpose and motive of the parties in entering into the licensing plan was

to eliminate price competition.³⁰ This is shown, almost without more, by the fact that the general licensing plan was put into effect only eleven weeks before the crucial patent was due to expire. But even if it be assumed that appellees were in part motivated by proper patent considerations, that would not protect their scheme if price stabilization was also an important object. In other words, if price fixing is an object of the plan,

³⁰ In the court below the Government argued that when a motion to dismiss is made at the conclusion of the plaintiff's evidence, the trial court will view the evidence in the light most favorable to the plaintiff to determine whether substantial evidence exists justifying the relief requested. This is the ancient rule in non-jury law cases. *George A. Fuller Co. v. Brown*, 15 F. 2d, 672, 675 (C. C. A. 4). It is also the rule followed in the 3rd Circuit: *Schad v. Twentieth Century-Fox Film Corporation*, 136 F. 2d 991 (C. C. A. 3), which was decided under Rule 41 (b) of the Rules of Civil Procedure. It was the view, it is submitted, which the framers of the Rules intended. See comment, W. D. Mitchell, before the New York Symposium (1938), *Proceedings of Institutes*, at pp. 336-337. The court below, after appellant had rested, signified that it intended to "weigh" the evidence and make findings of fact, in accordance with Rules 41 (b) and 52 (a) as construed in *Gary Theatre Co. v. Columbia Pictures Corporation*, 420 F. 2d 891 (C. C. A. 7) (R. 3966). Rule 41 (b) has since been amended to give the trial court an option either to decline to pass upon the defendant's motion until the close of the case or "as trier of the facts" to then "determine" them. Amendments, Rules of Civil Procedure, Rule 41 (b). We submit that in this case the evidence must be found to support the Government's contentions irrespective of which view of the court's functions is taken.

and not merely a method of assuring the patentee a pecuniary reward, the scheme is unlawful.

We recognize that our contention that appellees combined for the purpose of stabilizing prices is contrary to the findings of the court below. In this Point, after discussing the legal principles to which we have briefly referred, we shall show that the findings below on this question are clearly and manifestly wrong.

A. A plan designed to control prices is unlawful even though it rests on patent license agreements

There is no question in this case but that, since 1929 at least, the appellees have fixed and maintained non-competitive prices in the sale of gypsum board (Finding 19, R. 4143). Under the guise of price control, as discussed above, they have, in fact, brought about a complete regulation of the gypsum industry. They enjoy a monopoly of the business. Apart from the question of patent justification, therefore, appellees' action in bringing about this state of affairs would unquestionably be in flagrant violation of the Sherman Act.

As this Court stated in *United States v. Socony Vacuum Oil Co.*, 310 U. S. 150, 218, 221, in reaffirming the principles enunciated in *United States v. Trenton Potteries*, 273 U. S. 392:

Thus for over forty years this Court has consistently and without deviation ad-

hered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense. * * *

* * *
Any combination which tampers with price structures is engaged in an unlawful activity.

Stated succinctly, "Price-fixing, reasonable or unreasonable, is 'unlawful, per se'"; *United States v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 720.

Moreover, it is clear that prices are nonetheless fixed by agreement, although the actual control is delegated to one of the parties. In the present case appellees carefully point out that only USG issued price bulletins. The licensees never knew exactly what price would be fixed, though they hoped it would be high (R. 2972-2973). But here, as in *United States v. Masonite Corporation*, 316 U. S. 265, at p. 276:

Prices are fixed when they are agreed upon. *United States v. Socony-Vacuum Oil Co.*, *supra*, p. 222. The fixing of prices by one member of a group, pursuant to express delegation, acquiescence, or understanding, is just as illegal as the fixing of prices by direct, joint action.

It is further established beyond question that when competitors in an industry engage in a plan to fix prices, it is wholly immaterial that the means adopted, when viewed apart from the conspiracy, may be quite lawful. In the history of the Sherman Act many devices have been employed, but without exception the courts have brushed them aside to condemn the underlying vice of concerted action to eliminate competition. *United States v. American Tobacco Co.*, 221 U. S. 106, 181. One of the clearest expressions of the point is that of Mr. Justice Holmes in *Swift & Co. v. United States*, 196 U. S. 375, where he said (p. 396):

The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful.

And see *Aikens v. Wisconsin*, 195 U. S. 194, 206; *United States v. Univis Lens Co.*, 316 U. S. 241, 254.

The argument upon this point, accordingly, comes down to the simple proposition that if the appellees adopted a patent-licensing scheme as a means to organize their industry and stabilize prices, the scheme is *per se* unlawful. That the appellees may have acted in "good faith," or upon the advice of counsel, as seems to have been the case here, in carrying out a scheme to circumvent the Sherman Act is of course no defense. For, as said in *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 49:

The law is its own measure of right and wrong, of what it permits, or forbids, and the judgments of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and, it may be, of some good results. *United States v. Trans-Missouri Freight Assn.*, 116 U. S. 290; *Armour Packing Co. v. United States*, 209 U. S. 56, 62.

Nor is it important that appellees may not have been familiar with the statute, though the contrary is true here, or not have "intended" to do anything in violation of its provisions. The position of this Court upon such a contention was well stated in *United States v. Patten*, 226 U. S. 525, 543:

Bearing in mind that such was the nature, object and scope of the conspiracy, we regard it as altogether plain that by its necessary operation it would directly and

materially impede and burden the due course of trade and commerce among the States and therefore inflict upon the public the injuries which the Anti-trust Act is designed to prevent. See *Swift & Co. v. United States*, 196 U. S. 375; 396-400; *Loewe v. Lawlor*, 208 U. S. 274; *Standard Oil Co. v. United States*, 221 U. S. 1; *United States v. American Tobacco Co.*, 221 U. S. 106. And that there is no allegation of a specific intent to restrain such trade or commerce does not make against this conclusion, for, as is shown by prior decisions of this court, the conspirators must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result. *Ad-dyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 243; *United States v. Reading Co.*, 226 U. S. 324, 370.

The foregoing propositions of law are too well settled almost to bear restatement. They are set out here only because the appellees, and the court below, seem not to have appreciated their true force and effect. Appellees argue, however, that while the law may forbid conspirators to stabilize prices throughout an industry by other devices, however lawful in and of themselves, that law

does not apply where patent licenses are the means employed.

Appellees rely for authority upon two decisions of this court: *Bement v. National Harrow Co.*, 186 U. S. 70, and *United States v. General Electric Co.*, 272 U. S. 476. But a brief examination of these cases will show that they do not stand for the proposition that competitors may lawfully conspire to organize an entire industry and stabilize prices by the simple device of using common patent licenses. The question was not presented in either case. The pattern of fact in each case was merely that of a patentee granting a license to a single licensee.

Under those circumstances Chief Justice Taft in the *General Electric* case said that a patent holder might properly control his "licensee's" prices and methods of sale, "provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly" (*Ibid.* p. 490). Obviously such a holding falls far short of sanctioning a conspiracy to organize an industry and stabilize prices. But in the *Bement* case the express point was raised in argument that actually what the parties were doing by their licensing plan was to circumvent the Sherman Act by organizing and controlling the entire harrow industry. The comments of Mr. Justice Peckham upon this point are illuminating (pp. 94-95):

But there is no finding by the referee that such contracts were in fact entered

into by those other parties nor that they constituted a combination of most, if not all, of the persons or corporations engaged in the business concerning which the agreements between the parties to this suit were made. If such similar agreements had been made, and if, when executed, they would have formed an illegal combination within the act of Congress, we cannot presume for the purpose of reversing this judgment, in the absence of any finding to that effect, that they were made and became effective as an illegal combination. As between these parties, we hold that the agreements A and B actually entered into were not a violation of the act. We are not called upon to express an opinion upon a state of facts not found.

In the lower courts, with the facts fully developed, the scheme to make use of the patents as a means of controlling prices had been held to be unlawful. There is no suggestion in the *Bement* case that these cases were wrongly decided. *National Harrow Co. v. Hench et al.*, 83 Fed. 36 (C. C. A. 3); *National Harrow Co. v. Hench et al.*, 76 Fed. 667 (C. C. E. D. Pa.); *National Harrow Co. v. Hench et al.*, 84 Fed. 226 (C. C. N. D. N. Y.). And subsequently in *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, at 48, the Court recognized that the *Bement* decision was confined in its scope, saying that the price fixing scheme there involved had

* * * a purpose and accomplished a result not shown in the *Bement Case*. There

was a contention in that case that the contract of the National Harrow Company with Bement & Sons was part of a contract and combination with many other companies and constituted a violation of the Sherman law, but the fact was not established and the case was treated as one between the particular parties, the one granting and the other receiving a right to use a patented article with conditions suitable to protect such use and secure its benefits. * * *

The *Bement* and *General Electric* cases thus afford no direct support for appellees' position. Appellees contend, however, that a logical structure can be erected upon the *General Electric* doctrine which forces the conclusion that it is perfectly lawful for competitors to combine to organize an industry and stabilize prices. That is, if a patentee may license one competitor and fix his prices, it follows, they say, that he may license two or three or more. And from this it is but a short step to say that competitors may employ patent licenses for the purpose of fixing prices for an entire industry. Needless to say there is nothing in the *Bement* or *General Electric* cases or the patent law which goes so far.^{30a}

^{30a} See *United States v. Paramount Pictures*, 66 F. Supp. 323, 340 (S. D. N. Y.) where Judge A. Hand distinguished the *General Electric* case: "for there a license to only a single licensee—the Westinghouse Company—was involved, and therefore, no conspiracy which sought to amplify the rights of the licensor under the Patent Act."

Price control is not a positive right which a patentee may hold out to his competitors as an inducement to eliminate competition in an industry. At most, as will be discussed more fully under Point II, it is a mere protective right, sanctioned by "public policy" and enforced by the courts, "as a mode of maintaining the integrity of a patent." See dissent, *MacGregor v. Westinghouse Co.*, 329 U. S. 402, at 413. A right so carefully limited may not be inflated into an aggressive means of organizing an industry and stabilizing prices, with the purpose and effect of circumventing the Sherman Act.

Moreover, appellees' contention flies squarely in the face of a basic concept of the Sherman Act. That is, many things which, if done by one person may be entirely lawful, take on a very different aspect when done by the concerted action of many. (The Sherman Act, Section 1, is directed at combination and conspiracy. Assuming, therefore, that a patentee may lawfully fix the prices of a single licensee, it by no means follows, as the appellees would have it, that erstwhile competitors may conspire to blanket an entire industry under such licenses in order to organize the industry and stabilize prices.

The point has been discussed with great clarity by this Court in numerous cases where lawful devices other than patent license agreements have been employed by the parties. In *United States*

v. *Reading Co.*, 226 U. S. 324, for example, the point was made as follows (p. 357):

It is not essential that these contracts considered singly be unlawful as in restraint of trade. So considered, they may be wholly innocent. Even acts absolutely lawful may be steps in a criminal plot. *Aikens v. Wisconsin*, 195 U. S. 194, 206. But a series of such contracts, if the result of a concerted plan or plot between the defendants to thereby secure control of the sale of the independent coal in the markets of other States, and thereby suppress competition in prices between their own output and that of the independent operators, would come plainly within the terms of the statute, and as parts of the scheme or plot would be unlawful.

To the same effect see *Grenada Lumber Co. v. Mississippi*, 217 U. S. 433, 440; *Eastern States Lumber Ass'n v. United States*, 234 U. S. 600, 614; *Binderup v. Pathe Exchange*, 263 U. S. 291; *American Tobacco Co. v. United States*, 328 U. S. 781, 809.

But it is not necessary to treat the question in terms of nonpatent cases. In the case of *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, this Court was faced with an industry wide price fixing scheme based on patent license agreements. It differed from the present scheme principally in that the patent was not held by the

principal manufacturer, Standard, but was transferred to one Wayman, who then licensed the industry upon a royalty basis with provisions to eliminate "seconds," control jobbers and fix prices. Defendants urged that the license they had used "followed the precedents and was based on that principle of the patent law which gives to the owner of an invention the power to grant to others its use or to withhold it, or to grant it upon such terms as he may choose to impose."

The Government's contention there, as here, was that the scheme was largely subterfuge, "illegal purpose liveried in legal forms to give color of right to illegal practices" (p. 39). The Court decided that the agreements "transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it" and "accomplished a restraint of trade condemned by the Sherman law" (p. 48). It is significant that the Court did not say that since a patent holder may license one manufacturer he may license all, and "upon such terms as he may choose to impose." On the contrary the Court said, (p. 49):

Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights an universal license against positive prohibitions. The Sherman law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained.

Appellees seek to distinguish the *Standard Sanitary* case. They say that in the present case USG has kept the patents in its own hands and, moreover, has been careful as respects prices to fix them according to its own wishes without consulting the licensees. But this, it is submitted, is, under the present circumstances, an irrelevant distinction. If the parties in fact have conspired to organize the industry in that manner, rather than as in the *Standard Sanitary* case, the apparent regularity of the transaction would be greater, but the evil accomplished would be the same. Appellees would have been ill advised indeed to have adopted no other device than the identical one in the *Standard Sanitary* case.

Moreover, the case of *United States v. Masonite Corporation*, 316 U. S. 265, it is submitted, affords a complete answer to appellees' contentions. In that case, Masonite, like USG in this case, held certain patents on the principal industry product. It was engaged in manufacturing "hardboard", and sold it in active competition. There, as here, there was a history of patent infringement and litigation. And, in that case as in this, an arrangement was finally worked out to organize the industry and stabilize prices. The scheme agreed upon was that Masonite alone would manufacture the patented board, and it in turn would license its erstwhile competitors to sell as *del credere* agents at fixed prices.

Masonite, it will be noted, was even more circumspect than USG has been in its retention of control of the patents and the right to dictate the prices to be charged for the patented product. Moreover, in that case, as here, it could be argued that since a patentee may lawfully license one licensee to vend the patented product as a *del credere* agent, the patentee could likewise license two or three or more. Hence, it would follow, if appellee's position were correct, that Masonite could properly have licensed all its competitors to sell as *del credere* agents and thus entirely eliminate competition in the industry.⁶⁰

But a unanimous court held to the contrary. The dominant concern of the patent system, it said, was that stated by Mr. Justice Story in *Pennock v. Dialogue*, 2 Pet. 1, 19, i. e., the promotion of the progress of science and the useful arts; reward of inventors is secondary and merely a means to that end. The Court stated (pp. 278-279):

That must be the point of departure for decision on the facts of cases such as the

⁶⁰ The circumstance that in the *General Electric* case the patent license was to "make" and "vend," while in *Masonite* it was limited to the latter, it is submitted, is without significance. Both rights, like the right to "use," derive from the same statute and have equal sanctity. "The statutory authority to grant the exclusive right to 'use' a patented machine is not greater, indeed it is precisely the same, as the authority to grant the exclusive right to 'vend' * * *." *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U. S. 502, 516.

present one lest the limited patent privilege be enlarged by private agreements so as to by-pass the Sherman Act. *Ethyl Gasoline Corp. v. United States, supra*, pp. 456-459. Certainly if the *del credere* agency device were given broad approval, whole industries could be knit together so as to regulate prices and suppress competition. That would allow the patent owner, under the guise of his patent monopoly, not merely to secure a reward for his invention but to secure protection from competition which the patent law, unaided by restrictive agreements, does not afford.

And further (p. 282):

The power of this type of combination to inflict the kind of public injury which the Sherman Act condemns renders it illegal *per se*. If it were sanctioned in this situation, it would permit the patentee to add to his domain at public expense by obtaining command over a competitor. He would then not only secure a reward for his invention; he would enhance the value of his own trade position by eliminating or impairing competition.

The result, it is submitted, is that a combination between erstwhile competitors to organize an industry and stabilize prices, *by whatever means*, is unlawful *per se*. Patent licenses with price control may not more than any other device be adopted concertedly by the members of an in-

dustry to eliminate competition and circumvent the Sherman Act.

B. Appellees have engaged in a conspiracy to employ patent license agreements to organize the gypsum industry and stabilize prices

It has been established, it is submitted, that a combination or conspiracy to organize an industry and stabilize prices is unlawful *per se*, notwithstanding lawful patent licenses may have been used as a means of carrying the conspiracy into effect. The scheme or plan being unlawful it is immaterial that the parts of the plan, when viewed by themselves, are lawful. It is submitted, further, that the facts of this case establish conclusively, not only that appellees have conspired to organize the gypsum industry and stabilize prices by means of patent license agreements, but that they have actually carried this plan into effect and completely eliminated competition in the industry.

The concept of a conspiracy or combination within the terms of the Sherman Act is relatively simple. Concerted action on the part of erstwhile competitors according to a common plan or scheme to restrain trade is the gist of the offense. It is not essential that there be any "contract" or "agreement" or "understanding"; the parties may never have met or talked with each other;"

¹¹ *Direct Sales Co. v. United States*, 319 U. S. 703.

one conspirator may not regard himself as the "agent" or "emissary" of another; it is enough that they all act in concert in furtherance of a common purpose to restrain trade and eliminate competition.

Speaking of the conspiracy found to exist in *United States v. Masonite Corp.*, 316 U. S. 265, this Court said (p. 275):

It is not clear at what precise point of time each appellee became aware of the fact that its contract was not an isolated transaction but part of a larger arrangement. But it is clear that, as the arrangement continued, each became familiar with its purpose and scope. Here, as in *Interstate Circuit, Inc. v. United States*, 306 U. S. 208, 226, "It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it."

And continuing:

The circumstances surrounding the making of the 1936 agreements and the joinder in 1937 of the two other companies leave no room for doubt that all had an awareness of the general scope and purpose of the undertaking. As this Court stated in the *Interstate Circuit* case (p. 227): "It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of

the conspirators. * * * Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act."

The most recent statement of this Court is found in *American Tobacco Co. v. United States*, 28 U. S. 781, wherein the Court, through Mr. Justice Burton, said (p. 809-810):

It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition. No formal agreement is necessary to constitute an unlawful conspiracy. Often crimes are a matter of inference deduced from the acts of the person accused and done in pursuance of a criminal purpose. Where the conspiracy is proved, as here, from the evidence of the action taken in concert by the parties to it, it is all the more convincing proof of an intent to exercise the power of exclusion acquired through that conspiracy. The essential

combination or conspiracy in violation of the Sherman Act may be found in a course of dealing or other circumstances as well as in an exchange of words. *United States v. Schrader's Son*, 252 U. S. 85. Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified.

1. *The lower court's finding that no conspiracy has been shown in this case is clearly erroneous*

Here, as in the *Masonite* case, the lower court made findings that no conspiracy existed on the part of the appellees. Some of these findings, to which error is assigned, relate to specific items of evidence. We have dealt with them at the appropriate point in the course of the Statement of Facts. In Finding 118, R. 4167, however, the court found broadly that "The evidence * * * fails to establish that defendants associated themselves in a plan to blanket the industry under patent licenses and stabilize prices, as charged by the Government." It is submitted that the court erred in examining the evidence piecemeal and not in the light of the actual charges of the complaint, and that its finding is clearly erroneous."²

² The scope of the review where findings are challenged on appeal in an equity case was stated by Mr. Justice Jackson in *District of Columbia v. Pace*, 320 U. S. 698, as follows

The court below did not examine all of the evidence in the case upon conspiracy at any one time, but took up different parts of it at two widely separate places in its opinion. The court's reasons for so doing throw considerable light on the weight to be given to its evaluation of the evidence. Early in its opinion the court determined, contrary to the legal principles above discussed, that industry-wide or multilateral licensing, as employed by the appellees, was proper within the doctrine of the *General Electric* case (R. 3995-3996). That being true, a matter not conceded by appellant, the court stated that there were two questions of fact left for decision: one, whether the licenses were entered into as "bona fide" agreements and not as "sham"; the other, whether appellees carried their actual operations beyond the proper limits of their patent monopolies (R. 3999). By "sham" the court apparently meant agreements which the parties did not enter into in good faith or intend to carry out. See R. 4030.

In thus framing the first issue of fact for decision, it is submitted, the court below entirely misconceived the Government's position on the present point. It was not contended below, and it is not now, that the license agreements were

(p. 703): "• • • the whole case, both facts and law, is open for consideration in the appellate court, subject to the long-standing rule that findings of fact are treated as presumptively correct and are accepted unless clearly wrong."

"sham" in the sense meant by the court.⁶³ The evidence clearly shows that the appellees regarded the licenses as binding legal documents, and that they paid substantial royalties to USG. Griswold and Lenci both testified on direct examination that they understood the USG licensing plan, with price control, was legal and supported by the rulings of this court (R. 512-513, 2476). The court below seemingly did not appreciate that the Government's argument was that the scheme was illegal if an object of it was price fixing and not merely patent protection. Even if the patent motive was a subterfuge, this would not have made the licensing agreements "sham" in the court's sense of agreements made in bad faith, since the agreements were intended to be observed.

The court below, nevertheless, made an extended review of much of the evidence in the case to determine its bearing on the issue of "sham." Each exhibit and each bit of testimony so taken up was examined to see whether it evidenced bad

⁶³ In Reply Brief, May 18, 1944, at p. 44, when answering appellee's argument that there was nothing in Blagden's testimony to indicate that he thought the patent licenses were "sham," we said: "Surely they [defense counsel] understand that it is not necessary to prove conscious 'sham,' lack of 'bona fides,' or 'cover-up,' in order to make out a conspiracy case. The parties had supposedly competent legal counsel who advised that the *General Electric* case would permit them to organize the industry and stabilize prices. Defense counsel, even now, argue to the same effect. Their contention that the plaintiff has failed to show 'sham,' is therefore made simply to confuse the issue."

faith (R. 4028-4072). The court found that none of this evidence showed either (1) that the license agreements were entered into in bad faith as "sham" (Fdg. 30, R. 4148), or, (2) that they were "non-bona fide" because executed with "intent" to accomplish restraints beyond the proper limits of the patent monopoly (Fdg. 57, R. 4155). Hence, in the lower court's view, there was no evidence of conspiracy.

Much later in its opinion, the court took up what it termed "additional" evidence which it said was urged by the Government as showing conspiracy (R. 4101-4117). This evidence likewise does not appear to have been reviewed by the court in the light of the Government's actual position below, i. e., that a combination among erstwhile competitors to blanket an industry under common license agreements in order to organize the industry and stabilize prices is illegal *per se*. The court's consideration of the evidence was clouded by its view that an unlawful conspiracy could not be shown unless it involved a showing of "sham" (R. 4105). Our position below, as here, was that a conspiracy between competitors to by-pass the Sherman Act by taking out patent licenses for the purpose of price control is illegal, irrespective of whether the licenses are "sham" or valid. And we insisted below, as we do here, that all of the evidence in the record,

not merely certain "additional" evidence, is to be considered in determining that issue.

The court below disposed of a great part of the evidence of conspiracy as not showing that the licenses were "sham."⁴⁴ The small number of exhibits or "additional" evidence, reviewed by the court later in its opinion (R. 4101-4117), were taken up out of context and gave only a partial picture of the actual facts of the case on the conspiracy point, discussed at pp. 16-160 in the statement herein. It is submitted, accordingly, that the lower court's finding that the evidence does not "establish that defendants associated themselves in a plan to blanket the industry under patent licenses and stabilize prices" (Fdg. 118, R. 4167), was based on an inadequate consideration of only part of the evidence. It is our present position, as it was below, that when all the evidence is considered, both in the shape of uncontradicted testimony and exhibits, a finding that appellees were engaged in a conspiracy to organize the gypsum industry and stabilize prices, and not in merely seeking to protect the USG patent monopoly, is clearly required.

⁴⁴ Among the many findings addressed to the question whether the evidence shows "sham" or lack of "bona fides" are the following: Fdgs. 29, 30, 35, 39, 40, 43, 57, R. 4148-4152, 4155. It is submitted that these findings are immaterial to the issues of the case and may be disregarded.

2. *The lower court erred in holding that the declarations of the appellées were binding only upon the declarants.*²²

It is further essential to an understanding of the lower court's action in making Finding 118, as well as other findings, to consider its holding

²² During the course of the trial the Government followed the procedure outlined in Rule 36 of F. R. C. P. and served separate requests on USG and National to admit the genuineness of certain documents, which they did. When these exhibits were offered in evidence, however, the district court ruled, upon objection, that such exhibits could only be received as binding upon the party making the admission, since the nonstipulating party had had no opportunity to cross-examine the writer upon the question of authenticity (R. 3776, 3801-3802). This ruling, it is submitted, if correct, would largely destroy the value of Rule 36 as a means of expediting trial in conspiracy cases.

In the case of *United States v. Vehicular Parking Ltd., et al.*, 52 F. Supp. 751 (D. Del.) the court said (p. 755): "It seems to me nonstipulating defendants are bound by these admissions, until they disprove authenticity." And in *United States v. National Lead Co., et al.*, 63 F. Supp. 513²³ (S. D. N. Y.), Judge Rifkind ruled in the course of trial (Tr. 421-427) to the same effect. His reasoning upon the point is persuasive: "It seems to me the balance of convenience lies here in overruling the objection especially since I take it that your objection to authenticity is not because you are really questioning the authenticity of the signature, but simply because you want an opportunity to cross-examine with respect to the verity of the declarations in the agreement. I think that that would not be accomplished by sustaining your objections, and if you want to challenge these declarations you will have to (A) either produce evidence to contradict it, or, (B) establish the absence of any conspiratorial relationship between the two parties, in which case the document would go out as far as your client is concerned." In view of this apparent conflict in interpretation

with respect to the declarations of alleged co-conspirators. The case below was tried in consonance with the many holdings of this Court that the acts and declarations of a conspirator in furtherance of a conspiracy are binding upon his coconspirators.⁶⁶ The rule is perhaps best stated in the case of *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, where Mr. Justice Pitney said (p. 249):

The proceedings of the international and sub-district conventions were shown by the introduction of official verbatim reports, properly authenticated. It is objected that these proceedings, especially in so far as they include the declarations and conduct of others than the answering defendants, are not admissible because the existence of a criminal or unlawful conspiracy is not made to appear by evidence *aliunde*. The objection is untenable. In order that the declarations and conduct of third parties may be admissible in such a case, it is necessary to show by independent evidence that there was a combination between them and defendants, *but it is not necessary to*

of Rule 36 an expression of the Court upon the question would, it is submitted, be in the public interest.

The trial court's ruling applied to the following exhibits, certain of which contained declarations in furtherance of the alleged conspiracy: Exs. 550, 554, 556, and 693 to 785, except exhibits 698, 715, 716, and 728. R. 6243-6246, 6248, 6492-6583. Ex. 693 was subsequently admitted. R. 3873.

⁶⁶ See, for example, *Connecticut Mutual Life Ins. Co. v. Hillmon*, 188 U. S. 208; *International Indemnity Co. v. Lehman*, 28 F. 2d 1, 4 (C. C. A. 7).

show by independent evidence that the combination was criminal or otherwise unlawful. The element of illegality may be shown by the declarations themselves. The rule of evidence is commonly applied in criminal cases, but is of general operation; indeed, it originated in the law of partnership. It depends upon the principle that when any number of persons associate themselves together in the prosecution of a common plan or enterprise, lawful or unlawful, from the very act of association there arises a kind of partnership, each member being constituted the agent of all, so that the act or declaration of one, in furtherance of the common object, is the act of all, and is admissible as primary and original evidence against them.

Much of the evidence in the case below was introduced, as exhibits, in the form of letters, memoranda, and agreements written by the active participants in the alleged conspiracy. Speaking of evidence of this sort in *United States v. Corn Products Refining Co.*, 234 Fed. 964 (S. D. N. Y.), Judge Learned Hand said (p. 978):

Ordinarily the intent, which plays so large a part in the decisions of the court in cases of this sort, must be gathered alone from the conduct of the defendants themselves; but in this case, by an unusual chance, the evidence goes much further. The officers of the Corn Products Refining Company apparently had a custom of communicating

with each other by typewritten, unsigned memoranda * * *. The documents were never intended to meet the eyes of any one but the officers themselves, and were, as it were, cinematographic photographs of their purposes at the time they were written. They have, therefore, the highest validity as evidence of intention, and, although in many instances Bedford attempted to contradict them, his contradiction only served to affect the general credibility of his testimony.

It will be noted that, within the *Hitchman* rule, before evidence of this type is admissible as binding upon alleged coconspirators, it must first be shown *prima facie*, by evidence *aliunde* the declarations, that an association or combination exists, but not that it is unlawful. That is, it was necessary here to show that appellees were associated together "in the prosecution of a common plan or enterprise, *lawful or unlawful*." With that established, the large number of exhibits in the case would then become binding "as primary and original evidence" against each conspirator."

"That counsel for appellees fully recognized the force of the *Hitchman* holding is shown by the following excerpt from the proceedings (R. 3896) :

"Mr. BROMLEY. * * * I am mindful of the fact that the Government need only prove a lawful arrangement, I know that, sure.

"Justice STEVENS. Prove what?

"Mr. BROMLEY. That they need only establish for their *prima facie* case, a lawful arrangement, then they can come along with declarations and give the illegal color or character if they want to."

The court below ruled (R. 4028), "that there is no evidence, outside the declarations, of the conspiracy charged." Hence it followed, in the lower court's view, that the many writings made by the parties in carrying out the alleged conspiracy, must be disregarded, except as they would constitute admissions in each case on the part of the declarant. The court reached this conclusion upon a review in only four pages (R. 4024-4028), of but a small part of the evidence in the case independent of the declarations.

It is submitted that in so doing the lower court erred in failing to find that a *prima facie* conspiracy had been made out within the rule of the *Hitchman* case. It largely disregarded that case. Nowhere in its short consideration of the evidence under this topic is there recognition that it is only necessary to show an informal association in furtherance of a common plan, "lawful or unlawful." On the contrary the court speaks throughout as though the evidence at this point in the proceeding must actually "prove the conspiracy charged" (R. 4026), by which the court seemingly meant that both the fact of combination and the unlawful purpose which made it a "conspiracy" must be proved. Obviously the *Hitchman* case announced no such rule, for if the independent evidence proved the case, it would be unnecessary to bother with the declarations at all. A ruling which would thus destroy, for all prac-

tical purposes, the value of that evidence which has the "highest validity" is manifestly erroneous.

3. *Appellees have associated themselves together in furtherance of a common plan.*

There is an abundance of evidence in the record apart from the declarations, it is submitted, to show that appellees have been associated together "in the prosecution of a common plan or enterprise, lawful or unlawful," within the rule of the *Hitchman* case. The "plan" stands out on almost every page of the record; briefly stated, it was to blanket the entire gypsum industry under common patent license agreements with price control. New patents and new licenses were added from time to time, one or another party has joined the group or been absorbed and dropped out, but the basic "plan," it is submitted, has not changed.

That such a "plan" has been in successful operation since at least 1929, as related *supra* pp. 102-160, can be established entirely by evidence apart from declarations. The May and November license agreements between USG and the earlier defendant were admitted generally (R. 450-455). The same is true of the large batch of price bulletins (Exs. 33-39, R. 460-463) which were issued under these licenses. Moreover, the court below found, and the fact is not now questioned, that "each licensee, in the main, sold gypsum board manufac-

tured by it at the prices and upon the terms and conditions stipulated in the bulletins" (Fdg. 19, R. 4143). Also it is not questioned that the meetings between representatives of the many licensee companies were held, or that the subject of price control was discussed (R. 2617-18).

In addition, the witness Lenci testified at great length concerning the raising and stabilization of prices (R. 2972-2973); the actual elimination of open-edge board and No. 2 board (R. 2553, 2982, 2518, 2519); the licensee meetings (R. 2534-2540, 2601-2613, 2640-2689); the policing of USG and the licensees (R. 2758-2761); the elimination of jobbers (R. 2997); the tampering with the price of plaster (R. 2992-2993); and generally concerning the progressive control of distribution which appellees have put into effect.

It is not necessary to review the testimony of Lenci; or of the other witnesses: Higgins, Tomkins, McCormack, Sensibar, and others who likewise gave testimony concerning the operation and effect of the licensing arrangement. It should be noted, simply, that this was all evidence, apart from the declarations, showing that since 1929 at least appellees have been intimately associated together in actual operation under industry wide license agreements with price control.

This state of affairs did not happen by chance; on the contrary, it is submitted, it was the fruit of the "plan" which had its inception in the con-

versations between Blagden and Avery in 1925, and which was actively promoted by Blagden, Avery and Griswold in the next two or three years. Both Blagden and Griswold were called as witnesses, identified various exhibits, and gave testimony, under cross-examination, not only of conferences with Avery, but that each contacted the members of the industry on one or more occasions and urged them to take out a license with USG with price control.

Blagden testified that on the Thursday preceding December 12, 1925, he met with Avery in Chicago and discussed the possibility of settling USG's infringement suit against Beaver (R. 784-786). The details of the discussion were not recalled by Blagden, but he did remember that there was discussed at this conference, (a) that Beaver would pay damages to USG, (b) that Beaver would acknowledge the validity of USG's patents, (c) that Beaver would become a licensee of USG under their board patents, and (d) that USG would have price control (R. 785-790).

After further conferences with Avery, Blagden testified that the original Beaver-USG license was signed (Ex. 1, R. 4205). This license, providing prominently for price control, became the pattern for all subsequent agreements. Thereafter Blagden testified that he had conversations with the other members of the industry, in particular: George M. Brown of Certain-teed (R. 831); Hag-

gerty of National (R. 862); Fuller of Atlantic (R. 862); Gloyd of Texas (R. 862); Ebsary of Ebsary (R. 861); Shearer of Universal (R. 827); and "I undoubtedly talked to some others, but I can't remember" (R. 863).

Blagden testified generally as to these conversations as follows (R. 862):

Q. Well, can you recall the subject-matter that you discussed?

A. Whenever I met with these gentlemen they would ask me were we going to take out a license; or had we taken out a license with U. S. Gypsum, and I would tell them we had, and if they would ask me, "Well, what do you think about it?", I would say, "I advise you to join up."

When questioned as to what reasons he gave the members of the industry for signing the license, Blagden testified that he told each in substance the same thing (R. 831):

Q. Now did you give Mr. Brown any further advice as to the benefits of a license agreement?

A. I can't remember any.

Q. Did you talk to him about stabilizing prices under a license agreement?

A. I told him that, undoubtedly, if he were in with the others he would get the benefit of stabilization.

Q. By "stabilization" what do you mean?

A. Stable prices.

Q. And by "stable prices" do you mean uniform prices?

A. He would get the benefit of the license price, which would be the same price.

Griswold also was called as a witness, subject to cross-examination, and testified that he talked with Blagden in May 1926, concerning the USG license arrangement, and that "it would probably have a stabilizing influence on the market" (R. 513). On May 12, 1926, he wrote a letter, concerning his meeting (Ex. 104, R. 5260), in which he said: "according to the plans we have we figure that there is a possibility of us holding the price steady on wall board for the next fourteen or fifteen years which means much to the industry." On cross-examination he testified as to this (R. 701):

Yes, -I figured that if the different parties took out a license agreement with the United States Gypsum Company, and the law gave them the right to establish the price at which the licensee could sell the product, that the price on wallboard would remain fairly stationary unless it was disturbed by competition of other products.

Griswold wrote and talked with Avery on different occasions about the license arrangement. On October 15, 1926, he wrote Avery saying, in part, that a committee had been appointed which "expects to meet with all other Manufacturers of board who have not signed the License Agree-

ment. The meeting will probably be Thursday of this coming week with the object in view of getting united action on this matter" (Ex. 123, R. 5278). On receipt of this letter Avery wrote stating his appreciation of Griswold's efforts (Ex. 124, R. 5279). On the same day Avery wrote Blagden (Ex. 191, R. 5351), quoting from Griswold's letter that "this committee expects to meet with the object in view of getting united action" and concluding with the statement, "I do not know whether you expect to be a part of this meeting, but I hope so."

Griswold's meeting was not held as scheduled (Ex. 132, R. 5285), and on January 3, 1927, he wrote Avery that: "You will remember that I started out to deliver 100 percent of the manufacturers of board that would be willing to sign up on a license arrangement * * *." In answer to a question propounded by the court concerning this statement Griswold testified (R. 663): "That as I remember it, it simply had reference to the fact that at the beginning of efforts along this line, I voluntarily stated to Mr. Avery that I thought I could deliver one hundred per cent." And further (R. 664): "* * * I thought I could convince these people that they were making a mistake in not taking out a license, because they could make the board under the license as cheap, or cheaper, than they could make something that brought about a conflict."

Later Griswold testified that he had a meeting with Avery in Chicago in which he urged that the license offer be held open (R. 619). In answer to a question by the court as to what Avery said, Griswold testified: "Well, as I remember, it was that he insisted at that time, or stated that he wanted them all to come in, and of course, I had no connection with Certain-teed Products, and very seldom called upon them" (R. 620).

It is unnecessary to prolong this recital. As reviewed in detail in the statement of facts, *supra*, there was much additional evidence bearing on the point. For example, Holland was also active, in 1928 and 1929, in promoting the industry-wide licensing agreement. He testified: "Oh, I think I kept trying to talk these people into taking out a license" (R. 932). And what transpired at the May 1929 meetings in Chicago, at which substantially industry-wide acceptance of the original Beaver-USG licensing arrangement with price control was finally obtained, was developed by the oral testimony of Lenci (R. 2472-2476). But the Avery, Griswold, and Blagden evidence alone, it is submitted, establishes overwhelmingly, apart from the declarations, that they were engaged in a common plan, lawful or unlawful. As each additional party became acquainted with the "plan" and gave his adherence to it, he

⁶⁶ Avery did not testify orally, but the record contains many letters written by him.

became a co-conspirator against whom the declarations of all became admissible and binding as original evidence. *Interstate Circuit, Inc. v. United States*, 306 U. S. 208.

4. *The purpose of appellees' "plan" was to organize the gypsum industry and stabilize prices*

Blagden, Avery and Griswold, as has just been shown, were associated together in a "plan" to bring about industry-wide licensing with price control. Within the doctrine of the *Hitchman* case their acts and declarations in furtherance of the plan may now be examined as original evidence, binding upon them and all subsequent parties who were acquainted with the plan and gave their adherence to it. In other words, the declarations may now be used with all other evidence in the case to show the unlawful character of the "plan" or conspiracy.

The first exhibits to be considered as declarations are Blagden's letter and memorandum of December 12, 1925, sent to Avery of USG (Exs. 184, 185, R. 5337, 5338). Herein, Blagden not only states very clearly the "plan" of the conspiracy, as shown above by oral testimony, but lays bare its unlawful purpose. That is, Blagden was urging upon Avery a plan "along the lines which I have discussed with you" (Ex. 184, R. 5337), by which Avery "would be able to take a dominating position in the industry with an opportunity to control * * * prices through

legitimate means of patent licenses" (Ex. 185, R. 5347). In other words, as Blagden put it several times, the opportunity was one "to organize the industry and stabilize prices" (Ex. 185, R. 5339).

To implement the plan, Blagden said that Beaver "would agree to use its best endeavors to induce manufacturers of closed-edge wallboard other than defendant to accept licenses * * *" (Ex. 185, R. 5346). And, as discussed above, Blagden not only kept his word, but endeavored to persuade Brown of Certain-teed, an open-edge manufacturer, to take out a license (R. 830-831). With general recognition of the USG patents, Blagden pointed out, USG would be able "to maintain a lawful price control and avoid the necessity of a reduction by plaintiff [USG] of current prices to meet competition."

In other words Blagden was proposing that by licensing the gypsum industry, it should be possible, putting it bluntly, to eliminate competition. Blagden's hope was not immediately realized, for the entire industry did not come together under the licenses until 1929; and, as he predicted, USG had to revise its prices sharply downward during 1926-1929 to meet competition. *Supra*, pp. 38-40, 53-55, 67-68. It is submitted, however, that no clearer statement could well be made of a purpose to circumvent the Sherman Act than Blagden gave in these exhibits.

On October 1, 1926, Blagden wrote to Avery that "I feel that the 'entente cordial' that has

started between our companies is only a beginner and that if we play the game right it should bring big things" (Ex. 189, R. 5349-5350). Later, when questioned as to the meaning of the expression "entente cordial" in his letter, Blagden testified that he meant that "in addition to our taking out a license, that undoubtedly others would take out licenses and that would tend toward stability" (R. 864-865). It may very well be assumed that Blagden acted in "good faith," but it is incontestable from his testimony that he was promoting a plan to license the industry for the sake of "stability." And by "stability" he testified he meant "stabilizing the prices in the industry" (R. 865).

Sometime in April 1928, Griswold had a conference with Geo. M. Brown of Certain-teed about "the advisability of his taking out a license agreement" (R. 604). On April 12, 1928, Griswold wrote that Brown "stated very plainly to me that they were willing at that time to enter into a license agreement without any particular changes in it providing all of the manufacturers, including Ebsary, would enter into it and make it one hundred percent" (Ex. 141, R. 5292). Brown was not "willing to take out a license agreement with the USG on board," however, "unless it carried with it a general cleaning up of unsatisfactory conditions of all gypsum products" (Ex. 203, R. 5368).

This evidence shows that Certain-teed was fully advised of the plan to bring the industry together under the USG license. Moreover, Brown understood exactly what the purpose was, that is, to get rid of competition, and that of Ebsary in particular. Indeed, Exhibits 212 and 324 (R. 5376, 5947-5949), show that Brown knew only too well that the plan was one to give USG dominance over the industry. Therefore, when Brown went to Chicago in May 1929 in company with all his principal competitors, and signed up, the inference is irresistible that he intended to join the conspiracy "to organize the industry and stabilize prices."

The witness Black, of American, testified that he attended a meeting in October 1928 in New York at which the licensing arrangement was discussed (R. 1353). There were present: Holland of Universal, Reeb of Niagara, Haggerty and Baker of National, Walker and Henley of Certain-teed, and Ebsary. In a report to Kling (Ex. 203, R. 5367), Black said: "Mr. Ebsary is exceedingly anxious to have something done to straighten things up, and I noticed that Mr. Haggerty and Mr. Baker also seemed more anxious than they were thirty days ago."

It is evident further that the plan being discussed was that of getting everybody together under the license. "Mr. Walker, in particular, and supported by Mr. Holland, took the same

position they did the day before, that everyone must be very sure before going to Chicago that they were willing to walk up and sign up a license agreement with the USG, and also to foot the bill whatever it may be" (Ex. 203, R. 5368). This exhibit shows clearly that everyone knew that the plan was one to get the whole industry under license. Moreover, it is a fair inference that they understood that only by making it unanimous could they eliminate competition and correct the price situation.

Holland's presence at this meeting (Ex. 203, R. 5367) is significant. His company, Universal, was already a licensee, enjoying the privilege of making the "superior" closed-edge board (Ex. 2, R. 4226). But his company was in receivership, and as the lower court stated in its opinion (R. 4114), his purpose was quite frankly to get everyone in under the license "in order to help his company as well as the other manufacturers out of their unfortunate financial situation due to the litigation and the price war." That is, Holland frankly wanted to eliminate all competition in the industry.

Nor was Holland merely interested in board prices; he wanted general industry prices corrected. Thus on Sept. 20, 1928, he wrote Griswold: "I am afraid that nothing can be done towards stabilization until the board matter is entirely out of the way. I believe that Mr. Avery

has been very definite in a statement to that effect" (Ex. 147, R. 5298). When asked what he meant by the term "stabilization," he testified: "I would assume it had reference to the hope that the downward spiral of prices in the gypsum industry would stop" (R. 909-910).

By the end of 1928 only American was still unwilling to join the combination. On January 9, 1929, Haggerty wrote Holland that the question in his mind was whether it would be "advantageous to go in" without American, particularly since, "If this price control feature was discontinued in August, as is the case in the present form of the agreement, how could we expect the cooperation of the United States Gypsum Company in anything bearing upon a discussion of price?" (Ex. 205, R. 5370).

Holland replied on January 12, 1929, that he did not think the matter of future price control was the deciding factor with American. "You will remember that Mr. Avery made it very clear to us that if this *plan* could not be worked out on the Utzman patent that there were other patents available and we were all agreed that the fact that the Utzman patent expires next August is not a practical reason for continuing the conflict" (Ex. 206, R. 5371). Holland was called as a witness and failed to remember what the "plan" was, but he admitted that he wrote truthful letters (R. 938-939).

Holland's letter, as corroborated by his testimony, necessarily refers to the original Blagden-Avery "plan" to bring the entire gypsum industry under common license agreements in order "to organize the industry and stabilize prices." With the Utzman patent about to expire, "there were other patents available"; the essential thing was to get the industry together somehow under patent licenses with price control and end the competition.

Finally, eleven weeks before the Utzman patent was to expire, a meeting of the industry was arranged to be held in Chicago on May 21, 1929. American, however, still held out, probably for better terms on the USG infringement claim. Avery thereupon wired everyone: "Mr. Kling has sent in a contract with material changes and declares he will not attend meeting unless these changes are accepted by us Stop We can not accept them and regret that the Tuesday meeting will be *futile* unless other companies wish to proceed *as outlined* without American license" (Ex. 721, R. 6524).

What Avery meant when he suggested that the meeting might prove "futile" without American is reasonably clear. On May 17, 1929, the day before these wires were sent out, Avery wired Gloyd of Texas about the license discussions and said: "If license were generally closed it would be desirable to discuss a reasonable market price

for the licensed products" (Ex. 720, R. 6524). In other words Avery recognized, flatly, that he had to have the license "generally closed" before price control could succeed, and there was not much use in going ahead unless substantially all competition was eliminated.

What took place at the May 1929 meetings has been set out in detail, *supra*, pp. 65-74, and need not be repeated. Avery assured Lenci that industry-wide licensing with price control was perfectly legal under the *General Electric* case (R. 2794). Ebsary, Niagara, and Certain-teed all signed up, National having signed on May 16 (Ex. 3, R. 4239). On the next day price bulletins were passed out. *Supra*, pp. 70-73. Everyone present hoped that prices would be raised and stabilized (R. 2972-2973). There was to be no more price competition, or, as it turned out, any other type of competition in the gypsum industry, *supra*, pp. 102-160. The initial "plan" of Blagden, Avery and Griswold, "to organize the industry and stabilize prices" had finally borne fruit.

Appellees seek to dismiss all this evidence by pointing out that various witnesses testified that they made up their minds independently (Fdg. 37, R. 4150). And, further, that they would have taken out a license even though the others had not (*ibid*). It is no doubt true, in a sense, that each member of the combination had to decide in his own mind what to do. But, it is submitted,

to say that they each acted independently of the others is not true. Even until the last moment it was an open question whether Certain-teed and the others would go ahead without American. The decision to hold the May meetings irrespective of American was obviously the result of concerted action.

With the industry finally together under the Utzman patent, the next step was to find some other patent to continue the plan. On the last day of the May meeting, Avery proposed licensing with price control under the Roos "foam" patents (R. 2982). These, as it developed, could not be issued at once, and after many negotiations during the summer of 1929 it was arranged that Universal would sell the Haggerty starch patent to USG, and the industry would be licensed under it, with price control. *Supra*, pp. 80-87.

There can be no question, it is submitted, that these maneuvers were merely further steps in the original "plan" to maintain industry price control. As Avery had assured Holland, if the "plan" could not be worked out on the Utzman patent, "there were other patents available" (Ex. 206, R. 5371). Reference will be made to but one additional declaration upon the point. On July 23, 1929, the Board of Directors of National held a meeting at which Baker "stated that the United States Gypsum Company has been working on a plan to stabilize the Gypsum Industry" by grant-

ing licenses with price control on the "bubble system" patents. Under the agreements, Baker said "the prices of wall board would be fixed for the whole Industry for the term of approximately seventeen years" (Ex. 200, R. 5362).

Baker further said that "if co-operation in the Industry could be accomplished by such means, he believed it would be worth while" (Ex. 200, R. 5363). He did not say, it will be noted, that it would be important to National to have the use of the Roos patents; he was interested in "co-operation." The Board, thereupon, voted to authorize signing: "provided that the United States Gypsum Company, by virtue of the agreement with this Corporation and with other manufacturers of gypsum wall board, shall control the price of wall board sold in the United States and its possessions."

By "co-operation," it is submitted, Baker could only have meant the elimination of competition and the raising and stabilizing of prices. Lenci testified likewise that one of the reasons why Ebsary signed was to make sure that price conditions would be corrected, so that he "could make a profit" (R. 2970-2971). C. O. Brown of Certain-teed favored price control in order to have "a stabilized market" (R. 1069). Finally, the court in its opinion, states that Holland was interested in improving the "financial situation" of his company, and that of the other manufacturers as well (R. 4114).

That USG was interested in the "plan" in order to make "profits" is admitted. The lower court in Finding 74, R. 4158, said, "The primary purpose of USG in granting the licenses was [1] the settlement of litigation, [2] the collection of damages for infringement, [3] the obtaining of royalties, [4] *the fixing of a profitable price on patented board* and [5] the securing of the various advantages which would normally flow from the general manufacture and sale of the superior product."

By the time the industry came to negotiate the November 1929 licenses on the "starch" and "bubble" patents all the litigation had been cleared up, except with American, and that company settled on November 25, 1929. Reasons (1) and (2) therefore did not apply to these licenses. Aside from the matter of royalties which, though substantial, were deemed by Avery to be of secondary importance (Ex. 332, R. 5986), USG then had but two purposes in mind: (1) to make "profits" and (2) to obtain the "advantages" to come from "general manufacture" of a uniform product.

The licensees' purposes, it is submitted, were exactly the same. There can be no question that they wanted to make "profits", as above stated. Moreover, they likewise were ready to make a uniform product, whether "superior" or not. In fact, the lower court did not find that board made

according to the Haggerty patent was a "superior" product. But the licensees' understood fully the purpose to make a uniform product and approved of it. This was shown clearly by Brown's statement concerning the benefits to come from "stabilizing the whole industry by making a uniform product and get away from the fierce warfares between different products like we have recently had." (Ex. 226, R. 5390).

II

THE FIXING OF PRICES FOR A BASIC UNPATENTED ARTICLE
BECAUSE OF NARROW IMPROVEMENT OR PROCESS PATENTS
WOULD BE AN UNWARRANTED EXTENSION OF THE DOCTRINE OF UNITED STATES v. GENERAL ELECTRIC COMPANY

The burden of proof.—We do not understand that appellees question that they are parties to a combination which, apart from rights conferred by the patent law, would violate the Sherman Act. Rather, their position is that the combination is sanctified by rights conferred by the patent law as construed in *United States v. General Electric Co.*, 272 U. S. 476.

The Government has, however, made out a *prima facie* case when it has shown (1) that appellees are engaged in a combination or conspiracy, (2) to restrain trade in gypsum board and related products by fixing prices and controlling distribution. Such a combination is not only a violation of the Sherman Act, but it has long

been held to be illegal *per se*. (See Point I.) Accordingly, insofar as the rights conferred upon appellees by the patent laws may afford them a justification for their actions, it is for them to allege and carry the burden of establishing that they come within such protection. In the court below, the Government urged, and we urge here, that appellees have the burden of establishing: (a) that they have valid patents of a type to justify price control; (b) that the gypsum board made and sold by appellees has been, in fact, covered by such patents; and (c) that the price control exercised by appellees went no further than strictly necessary for the protection of their patents.

The court below, in its opinion, held that it was for appellant to carry the burden on these issues (R. 4004, 4049). In so doing, it is submitted, the court not only misconceived the true effect of the well-settled doctrine that price fixing among competitors is illegal *per se* (*United States v. Trenton Potteries*, 273 U. S. 392, and related cases), but misread Rule 8 (c), Federal Rules of Civil Procedure, which, for reasons of relative convenience and orderly presentation, provides in considerable detail that all defenses of the type urged by appellees in this case must be pleaded affirmatively. There are no cases squarely in point under Rule 8 (c). However, in *United States v. Motion Picture Patents Co.*, 225 Fed. 800

(E. D. Pa.), which presented issues similar to those in this case, the court said (p. 803) :

The next branch of the defense which presents itself for analysis and discussion is that based upon the patent rights of the Motion Picture Patents Company. The plea is, in legal effect and in practical acknowledgement, one in confession and avoidance, for there is, as already stated, a substantial (although not formal) admission that, with this patent ownership out of the case, plaintiff should have the relief prayed.

Compare *National Harrow Co. v. Hench*, 83 Fed. 36, 38 (C. C. A. 3); *United States v. Standard Sanitary Mfg. Co.*, 191 Fed. 172, 190 (C. C. D. Md.); *United States v. Eastman Kodak Company*, 226 Fed. 62 (W. D. N. Y.); *Chicago Board of Trade v. United States*, 246 U. S. 231, 237-239; *United States v. Univis. Lens Co.*, 316 U. S. 241.

Gypsum board and gypsum products are articles of commerce to be sold in a free market, except as appellees can show that they hold patents which carve out an exception in their favor. "Since patents are privileges restrictive of a free economy, the rights which Congress has attached to them must be strictly construed so as not to derogate from the general law beyond the necessary requirements of the patent statute." *United States v. Masonite Corp.*, 316 U. S. 265, at 280.

It will be appreciated that this position of the court below must have had an important bearing on its treatment and evaluation of the evidence. Some adverse findings might very well have been favorable to appellant had the burden of patent justification been put properly on the appellees. However, irrespective of where the burden is placed, it is submitted that the appellees have no justification under the *General Electric* case or the patent laws for their actions in this case.

A. *The USG patents are not basic patents representing fundamental developments*

The *General Electric* case was deemed by the court to be concerned with basic patents representing fundamental developments. Whatever justification there may be for permitting price fixing with respect to such patents does not extend to patents such as are here involved.

The patents "upon which the main board license agreements in the instant case were founded" (Fdg. 24, R. 4145), were five in number, to wit, the Utzman "closed-edge" patent (No. 1,034,746); the Haggerty "starch" patent (No. 1,500,452); and the three Roos "foam" or "bubble" patents (Nos. 2,017,022; 2,079,338, and 2,080,009). Each of these patents is set out as an exhibit to the complaint (R. 35, 64, 100, 104, 109). These are the patents which, in the view of the court below, justified appellees in their

price control and regimentation of the gypsum industry."

The court below found that "no substantial distinction can properly be drawn between the instant case and the *General Electric* case in respect of the importance of the patented improvements within the respective industries, or, in respect of the nature of the patents which underlie the license agreements in the two cases" (Fdg. 25, R. 4146).⁷⁰ And in Finding 24 (R. 4145), the court found that "these patents covered fundamental developments in the gypsum board manufacturing industry." It is submitted that both of these are unwarranted.

The *General Electric* case was tried upon certain broad stipulations which made it unnecessary for the court to examine in detail the claims of the three patents involved. It was stipulated

⁷⁰ The court below also found that licenses "to make, use, and sell board having a metallized surface" were granted on the Roos "metallized board" patent (No. 1,914,345) which covered "the use of foil as a thermal insulating element in board" (Fdg. 16, R. 4141), and that licenses were taken out on the Roos "perforated lath" patent (No. 1,938,354) "covering a fire resistant plasterboard" made by having "holes of given size punched through it at designated intervals." (Fdg. 17, R. 4142). Neither of these patents was introduced in evidence or brought before the court as exhibits to the complaint. These patents are obviously even less basic than the "closed-edge," "starch," and "foam" patents, and the argument in the text clearly would apply to them as well.

⁷¹ Although a part of the findings, this comparison of cases is obviously not a finding of fact but a legal conclusion. The facts as to the *General Electric* patents were not, of course, in the record in this case.

that the validity of the patents involved had been tested in litigation (R. 89, No. 113, 1926 Term, hereinafter referred to as GE. R. —), and the Government raised no issue either as to validity or scope (GE. R. 90). Moreover, not only was it assumed in the *General Electric* case that the lamps manufactured by the parties were "covered" by the patents, but it was stipulated (GE. R. 104) that General Electric had acquired "a practical monopoly of the manufacture and sale of incandescent electric lamps."

Supplementing this stipulation, the Government in its brief at page 7, made the further concession that:

* * * the General Electric Company does control through its patents on tungsten lamps and processes of manufacturing such lamps 86 percent, and can control 100 per cent of the electric-lamp business of the United States.

On this showing, after only a cursory description of the patents taken from the stipulated facts, Chief Justice Taft said: "These three patents cover completely the making of the modern electric lights with the tungsten filaments, and secure to the Electric Company the monopoly of their making, using and vending." *United States v. General Electric Co.*, 272 U. S. 476, 481.⁷¹ If the

⁷¹ The court below regarded the tungsten filament lamp patents in the *General Electric* case as "not basic" but as "merely improvements" (R. 3980), but held that the patents

five USG patents are to be compared with those in the *General Electric* case, as the court below did in Finding 25, they must be shown to have given USG virtual dominance of the gypsum board industry. An examination of the USG patents will show that they do not possess any such characteristics:

here involved "covered fundamental developments" (R. 3981) (Fdg. 24, R. 4145). We think the court erred with respect to both. This Court's opinion in the *General Electric* case demonstrates that it regarded the tungsten filament patent as fundamental to the "making of the modern electric lights." 272 U. S. at 481. Indeed in their brief below (p. 25), appellees cited with approval *General Electric Co. v. Laco-Philips Co.*, 233 Fed. 96 at 105-6 (C. C. A. 2), where the court, in holding the Just and Hanaman patent valid, gave its approval to Judge Mayer's glowing description of the tungsten lamp as follows:

"I think the invention here in suit is of great merit, entitled to firm support, and second only to Edison's. Edison found a dim pathway and transformed it into an illuminated road. Just & Hanaman have broadened that road into a boulevard, alive with blazing lights. It is not hyperbole to say that the tungsten lamp has made millions happier for its greater comfort and its better cheer * * *"

Appellees also cited *General Electric Co. v. Independent Lamp & Wire Co., Inc.*, 267 Fed. 824 (D. N. J.), where similar language was used in describing the ductile tungsten filament claimed by Coolidge. Although the tungsten filament patents were in a sense improvements of the original light bulb, they actually created a new and different product with which the former product could not compete. This was obviously not the situation in the instant case, since there is no such fundamental difference between open-edge and closed-edge gypsum board; the record shows that they did compete until the combination of appellees effectively stifled the competition. See pp. 38-40, 53-55, 67-68, *supra*.

1. *The Utzman patent.*—During the years 1926-1929, the Utzman "closed-edge" patent was the only principal patent upon which the court found that the parties based price control, and accordingly it may appropriately be examined alone. The court below found that the Utzman "closed-edge" board was a "superior product" (Fdg. 74, R. 4158).

This can be conceded, and still it is unquestionably true that Utzman contributed by his invention only a modest improvement in the method of making plasterboard. When his patent was issued in 1912, wallboard was already old in the art. Judge Evans, referring to the Utzman patent, said in *Bestwall Mfg. Co. v. United States Gypsum Co.*, 270 Fed. 542 (C. C. A. 7), that "the covering for the edges of the gypsum was the heart of the discovery" (p. 545), and also said (p. 544); "We may not, and in fact do not, agree with counsel for patentee that this was a 'broad novelty,' nor with its expert witness that this was a 'daring conception'."

That the Utzman patent did not make a fundamental change in product appears from the fact that until the remaining manufacturers of open-edge board became licensees in 1929 unpatented open-edge board was sold in active competition with the patented closed-edge board, despite repeated and drastic reductions in the price of closed-edge board and the introduction of still

lower priced "fighting" brands of closed-edge board (*supra*, pp. 38-40, 53-55, 67-68). The open-edge board did not disappear from the Eastern market until 1929 when those who were manufacturing it became licensees under the Utzman patent. It may also be observed that open-edge board continued to be sold in the Pacific Coast states in competition with closed-edge board after the Utzman patent expired (R. 3508, 3531-33, 3546).

It would seem clear that the Utzman patent did not, contrary to the lower court's finding (Fdg. 24, R. 4145), cover "fundamental developments in the gypsum board manufacturing industry" of equal significance with the stipulated importance of the General Electric patents. Even if true, the point would be of minor importance in this case, since industry-wide price fixing founded on the Utzman patent did not get under way until May 22, 1929, a matter of only eleven weeks before the patent expired. USG and its licensees were, of course, aware of this when the license agreements were signed, and obviously could not have regarded this patent as a fundamental basis for the price-fixing plan if they were thinking of the patent value alone. On and after August 6, 1929, appellees could make the "superior product" as they saw fit without benefit of license.

2. *The "starch" patent.*—From November 1929 until sometime in 1935 when the first Roos "foam" patent issued, the only principal patent upon

which the appellees could base their license agreements, as the court below found (Fdg. 24, R. 4145), was the Haggerty "starch" patent. The patent was acquired by USG from Universal so as to furnish a basis for maintaining the licensing system and price fixing after the Utzman patent expired. Numerous other patents were included in the November agreements,⁷² but these are not in evidence. And, moreover, all such patents had already been licensed to the appellees who had signed the May agreements. In addition to the "starch" patents, therefore, only the Roos "foam" or "bubble" and the Bayer applications were new to the November licenses.

It was on the basis of the Haggerty patent that the appellees really organized the gypsum industry and stabilized prices. Contrary to the lower court's findings, it is submitted that the Haggerty patent unquestionably did *not* represent a "fundamental development in the gypsum board manufacturing industry" (Fdg. 24, R. 4145); nor can it be said that "no substantial distinction" may be drawn between Haggerty and the General Electric patents as they were stipulated to be in that case. The Haggerty patent represented, at

⁷² It will be recalled that C. O. Brown wrote on August 9, 1929, that the reason for this was that: "The Attorneys feel that such a contract would be exceptionally strong and price control could be maintained for the life of the Contract without difficulty" (Ex. 231, R. 5401).

most, but a narrow and unimportant improvement in the art of making wall board.

There is no suggestion in the record that Haggerty created a new and different product. The claims of his patent read upon the old product long known to the trade to which a quantity of "cooked starch" had been added "to insure secure adhesion" of the paper covering or liners to the gypsum core (Claim 1, R. 68). The validity or scope of his patent has never been litigated; it was not considered of much consequence in the industry until the summer of 1929, when some vehicle had to be found upon which to base price control. Until that time companies not using the starch device had been able without difficulty to compete with the company owning the starch patent (Ex. 231, R. 5403). In fact that company went into receivership during this period despite sole ownership of the starch patent and its license under the Utzman patent.

The district court did *not* find that the Haggerty patent made a "superior" product. It found merely that Haggerty "solved the 'peeler' trouble in the gypsum board industry and made possible modern high speed production of gypsum board" (Fds. 12, 24; R. 4138, 4145). By the "peeler" problem the court had reference to the fact that on occasion, particularly when board was dried too rapidly, the paper liners might come loose in places from the gypsum core, causing blisters or "peelers." Since "peelers" ordinarily

could be discovered at the plant by proper inspection (R. 1414), the most that Haggerty could have contributed was some saving in time and expense in the manufacture of board.⁷³

3. *The "foam" or "bubble" patents.*—In 1935 the first of the Roos "foam" or "bubble" patents was issued, and in 1937, the second and third (Exs. 8, 9, and 10 attached to complaint, R. 100, 104, 109). Upon the expiration of the Haggerty patent on July 8, 1941, these were the only principal patents upon which the license agreements rested (Fdg. 24, R. 4145). These patents, like the Utzman and Haggerty patents, were found by the court below to be "products patents upon a building material called * * * wallboard"; each reading "upon the entire product"; and covering "fundamental developments in the gypsum board manufacturing industry" (Fdg. 24, R. 4145).

The lower court's finding that the three Roos "foam" patents are patents reading upon a material "called wallboard" is manifestly erroneous.

⁷³ In fact there is no evidence in the record that the Haggerty patent "solved" anything. The record shows that some witnesses testified that certain of the appellees used "starch" in the manufacture of board, but none testified to the use of starch according to Haggerty (C. O. Brown, R. 1241-1242; Whittemore, R. 1413; Chism, R. 3482). In fact Chism testified that Texas took out its license under the Utzman closed edge patent in 1927 in order to reduce manufacturing costs "due to loss from bad board, what we called 'peelers,' and broken edges" (R. 3479).

Brief examination of the claims of the three patents will show that the first and second patents have to do with an intermediate cellular or porous cementitious material described as being useful in the manufacture of many different types of building materials (R. 100, 104). Only the third Roos patent (No. 2,080,009) contains claims reading upon wallboard (R. 109).

It is submitted that the Roos "foam" patents, like the several patents above discussed, are merely narrow improvement patents. The basic or fundamental idea of making a lighter board by the introduction of sawdust or fiber, or of chemicals to produce air cells, as appears from the Roos specifications (R. 105), was old in the art. Roos did not invent a basically new product (and there is no evidence that any board was made according to his patent);⁷⁴ at most he contributed a new process to make an old product.⁷⁵ The court's finding that no substantial distinction can be drawn between the Roos "foam" patents and the patents in the *General Electric* case is plainly in error.

⁷⁴ The Government's position was and is that once a price-fixing conspiracy is proved, the burden is on the defendant to prove a patent justification, which includes proof that the patents were used. See pp. 218-221, *supra*. The court below apparently assumed that board was made according to the patents, on the theory that the burden was on the Government to prove the contrary (R. 4011).

⁷⁵ Both the scope and the validity of these patents is doubtful. See pp. 288-290, *infra*.

**B. *Narrow improvement and process patents
afford no basis for price control***

At the heart of the argument on this point is the question: under what circumstances and for what reasons may a patent holder license another and control the prices and terms of sale at which his licensee may sell the patented article. In *United States v. General Electric*, 272 U. S. 476, 490, Chief Justice Taft stated the rule to be that the licensor may limit his licensee's method of sale and the price: "*provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly.*" This is the test, as above noted, which appellees must satisfy as a matter of affirmative defense.

It is beyond the scope of this point to discuss the basis for the Court's holding. It will be noted, however, that the Court did not say that the licensor has an *unqualified* right to require his licensee to sell at such prices and on such terms as he may see fit to impose. The right to fix a licensee's prices, thus, is not treated as part of the patent grant, but as a mere subsidiary right fashioned by contract and sanctioned by the Court as a protection to the licensor in the enjoyment of his patent monopoly.

In *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 48, the Court had employed substantially the same test as that announced by Chief Justice Taft in the *General Electric* case.

There, in striking down industry-wide price-fixing licenses, the Court said: "The agreements clearly, therefore, transcended *what was necessary to protect the use of the patent or the monopoly which the law conferred upon it*. They passed to the purpose and accomplished a restraint of trade condemned by the Sherman law."⁷⁰

Two questions are thus presented in any case when a court is considering whether a licensor has pushed his price fixing too far: the first, whether the scope and importance of the patent is such as to justify any price control, will now be considered; the second, whether the licensor and his licensees have carried their activities beyond what is normally and reasonably adapted to secure pecuniary reward to the patentee for his patent monopoly, will be discussed in the next Point.

Since price control is a protective measure, it must be proportioned to the scope and character of the licensor's patents. Many patents do not admit of any degree of price control under the doctrine announced by the Court in the *General Electric* case. It is submitted that the Roos "foam" patents and the Haggerty "starch"

⁷⁰ In the recent case of *MacGregor v. Westinghouse Co.*, 329 U. S. 402, it was stated in the dissent (p. 413) that the right of a licensor to fix his licensee's pricing was "a mode of *maintaining the integrity* of a patent and as such is sanctioned by public policy." It is considered that this language is wholly consistent with the test laid down in the *Standard Sanitary* and *General Electric* cases.

patents, which as shown above are merely narrow improvement or process patents, fall in this class. And, *a fortiori*, as will be discussed later, they do not justify the complete regimentation of the gypsum industry carried out in this case. In so doing, the appellees went beyond what was necessary for the "protection" of their patents.

To illustrate, in the *Standard Sanitary* case the patent involved covered a "dredger"; that is, a machine, tool, or appliance used to distribute enamelling powder evenly when making bathtubs. By its use, as the parties contended, it was possible to make a "superior" bathtub. But, since the patent covered merely the "dredger" and not the bathtub, the Government contended that price control based on the finished product was not for the protection of the patentee's monopoly, but to protect his business of making bathtubs. The lower court put its decision in part upon the ground that a mere tool or appliance patent would not justify price control of the unpatented finished product.¹⁷ In this Court the combination

¹⁷ The opinion of the three-judge circuit court, in concluding its discussion of this subject, stated: "The fact that Wayman had a patent on something else, even though it was a tool used in one step of the making of the ware, gives neither him nor his licensees the right to restrain interstate trade in the ware. The ownership of a patent for a tool by which old, well-known, and unpatented articles of general use can be more cheaply made gives no right to combine the makers and dealers in the unpatented articles in an agreement to make the public pay more for it." *United States v. Standard Sanitary Mfg. Co.*, 191 Fed. 172, 192 (C. C. D. Md).

was found to be illegal without, as the Court said (p. 49), "entering into the consideration of the distinction of rights for which the Government contends between a patented article and a patented tool used in the manufacture of an unpatented article."

A mere process patent, it is submitted, likewise does not justify price control of the finished product. The patent grant in the case of a process patent gives the patentee a right to exclude others from using the patented process; the products, whatever they may be, are outside the patent grant. Price control of the finished product made by a licensee from his own materials, with his own labor and according to his own designs, and sold to the public by his own efforts, would not afford protection to the patentee for his "patent monopoly," but would be permitting him illegally to extend his control over the unpatented articles.

The question whether a licensor may base price control on a process patent, like the question concerning tool or appliance patents, has not been passed upon by this Court. It is submitted, however, that the situation in each case does not differ in principle from those in which this Court has refused to permit a patentee to use his patent to suppress competition in an unpatented article. For the patent on the process is, by its nature, not a burden on the article produced by the process.

The various circuit courts of appeals to which the question has been presented have, with a single exception,⁷⁸ denied the holder of a tool or process patent the right to fix the price at which his licensee may sell the unpatented product. *American Equipment Co. v. Tuthill Bldg. Material Corp.*, 69 F. 2d 406, 409 (C. C. A. 7); *Barber-Colman Co. v. National Tool Co.*, 136 F. 2d 339 (C. C. A. 6); *Cummer-Graham Co. v. Straight Side Basket Corp.*, 142 F. 2d 646 (C. C. A. 5); *Sylvania Industrial Corp. v. Visking Corp.*, 132 F. 2d 947, 955 (C. C. A. 4).

The rationale of the *General Electric* case leads to no different conclusion. Rather it supplies a second reason upon which to deny price control in the case of a process patent. Undoubtedly the holder of such a patent, particularly if he used it in his own business, would gain "pecuniary re-

⁷⁸ The Second Circuit ruled to the contrary in *Straight Side Basket Corp. v. Webster Basket Co.*, 82 F. 2d 245 (C. C. A. 2), without adverting to the nature of the patent, in reliance upon *Bement v. National Harrow Co.*, 186 U. S. 70, and the *General Electric* case. But in neither of these cases was the Court speaking of tool or process patents. The Second Circuit's decision has not only been expressly disapproved by the Fifth and Sixth Circuits in the *Barber-Colman* and *Cummer-Graham* cases, cited in the text, but as the latter case (which involved the same company) indicates, has been abandoned as protective authority by the successful party. And the Second Circuit itself, after referring to a conflicting decision and the present "tendency" of this Court, has stated that at the present time "the whole subject is plainly in flux." *United States v. Aluminum Co.*, 148 F. 2d 416, 438.

ward" if he could control his licensee's prices on the unpatented finished product. But it could hardly be said that such control was "normally and reasonably adapted" merely to secure reward for his patent monopoly. Rather, he would be going beyond anything "necessary to protect" the use of his patent and gaining an advantage by contract due to the elimination of competition in the unpatented article.

Another reason for differentiating between patents on an article itself and minor improvement and process patents lies in the possibility of multiple restraints if the latter provided a sufficient basis for price fixing. There may be a number of such patents relating to a single article. Can the owner of each patent fix prices on the product? To take a hypothetical case which has some resemblance to the case at bar, could the person who owned a patent on the method of putting sides on a freight car, the person who owned a patent on the bolts which hold the other parts of the car together, or the person who owned the patent on an improved but not indispensable type of insulating material fix the sale price for manufacturers of the entire car? And if each could, and if they had not gotten together by pooling their patents, which would prevail? Clearly the confusion which would result if such patents supported the price fixing on a finished product is as obvious as is the fact that allowing such control

of the finished product would permit a reward out of all proportion to the magnitude of the invention.

Both the Haggerty "starch" patent and the Roos "foam" patents contain a number of process claims (R. 68, 103, 108, 113). For example, Haggerty, in claim 4, claimed "the method of making a paper lined gypsum board which consists in intimately mixing cooked starch with dry gypsum and then rolling into shape on a paper liner" (R. 68). Roos, in patent No. 2,080,009, claim 7, claims "The process of making wallboard which comprises mixing a dense foam with a starch paste to expand the latter and form cells therein, adding the mixture to a slurry of calcined gypsum, placing the mass between sheet liners and drying the same" (R. 114). It is submitted that, on the authorities and principles above discussed, these and the other method or process claims in the Roos and Haggerty patents afford no justification whatever for the price control on wallboard exercised in this case.

Both patents, however, also contain article claims. Claim 10 of the Roos "foam" patent, No. 2,080,009, which is fairly typical of the article claims in that patent, reads as follows: "10. A plaster board having a porous body comprising a hardened cementitious material enclosing a plurality of voids encased in tough, pliable films" (R. 114).

But the discussion of prior art in the specifications (R. 110)⁷⁹ shows clearly that "porous or cellular" gypsum is old. Haggerty in 1922 described the making of a "porous" wallboard (R. 65). When the Roos patents were in interference with Rice, moreover, it was conceded by Roos that "cellular" gypsum was old in the art, and the court so held.⁸⁰ It is thus clear that both

⁷⁹ The specifications admit that (R. 110): "certain chemicals or minerals have sometimes been added to the dry calcined gypsum which will upon the addition of water evolve a gas causing the mixture to puff out or expand in volume and upon the setting of the gypsum will form a porous or cellular body * * *."

⁸⁰ See *Bayer v. Rice, et al.*, 75 F. 2d 238 (App. D. C.), where the court said (p. 240):

"The evidence discloses that partition tile made from gypsum, as well as wallboard made from gypsum, had been used commercially for years prior to the making of this invention. Of course, concrete blocks were still older. The evidence also discloses that cellular gypsum and cellular cement were known to the art. The patent to Sanford, No. 230151, dated July 20, 1880, covers a cellular gypsum product wherein the cellular structure is produced by means of a chemical reaction occurring in situ. The Luttgen patent, No. 845305, February 26, 1907, discloses a process of making a cementitious product filled with air spaces * * *."

In the brief filed on behalf of Roos and United States Gypsum Company in the above proceeding on October 24, 1934, No. 6141, the point was insisted upon, over and over again throughout the brief, that (p. 9): "*cellular cement as a product—a building material—was old in the art at the time that Roos and Rice and Bayer separately made their inventions.*" It was explicitly stated (p. 86):

"*So when Roos entered the field by making cellular cement products by his specific process, the ensuing product—namely, the cellular cement or the cellular gypsum—was well*

Roos and Haggerty are at most narrow improvement patents. Wallboard is old. Many inventors, particularly Utzman with his closed-edge patent, have contributed to the making of the board being sold today. Neither Roos nor Haggerty could say when this suit was brought that commercial gypsum board was in any large part the result of their inventive genius.

It was held in the *General Electric* case, as discussed above, that a licensor may control his licensee's prices provided the conditions of sale are "normally and reasonably" adapted to secure pecuniary reward for the "patentee's monopoly." No sanction is given to obtain reward for anything but the patentee's monopoly. The control of prices on products not embraced within the patentee's monopoly or on basic products on which the patentee is responsible for a nonbasic improvement would not be reasonably adapted to the securing of a reward on the patent. In other words, price control, to be permitted at all, must be carefully proportioned to the patentee's invention, to his actual contribution to the art sought to be controlled. He is entitled to "pecuniary reward" for nothing else. This would appear to be a basis for this Court's refer-

known in the art and, consequently, there was nothing new or novel about such lightweight cellular products made in the form of gypsum partition tile and gypsum wallboard.
[Italics in original.]

ence in *Katzinger Co. v. Chicago Metallic Mfg. Co.*, 329 U. S. 394, 400, to "the broad public interest in freeing our competitive economy from the trade restraints which might be imposed by price-fixing agreements stemming from *narrow* or invalid patents."

Upon this analysis it is submitted that Haggerty contributed nothing which would entitle him, as a "reward," to control the entire wall-board industry as was done in this case. And the same can be said for Roos. The one contributed, at most, a saving in expense of manufacture in making it possible to dry the board more rapidly without producing "peelers" (Fdg. 24, R. 4145); the other claimed a somewhat lighter board (R. 2532) which might be less costly to make and ship. (See, *supra*, pp. 73-76.) It needs no argument to point out that these inventions are not to be compared in importance with the inventions before this Court in the *General Electric* case, which were deemed to be basic and fundamental to the creation of the tungsten filament lamp.

Such being the case, to what, if any, extent should Haggerty or Roos be permitted to control the price of wallboard? There are no express holdings on the point in this Court, and hence it will be necessary to resort to analogy. In *Garretson v. Clark*, 111 U. S. 120, where the holder of a patent "for an improvement in the construc-

tion of mop-heads" sued an infringer to recover as damages the entire profits which the infringers had made in the sale of the completed mop, the Court said, in rejecting this measure of recovery (p. 121):

When a patent is for an improvement, and not for an entirely new machine or contrivance, the patentee must show in what particulars his improvement has added to the usefulness of the machine or contrivance. He must separate its results distinctly from those of the other parts, so that the benefits derived from it may be distinctly seen and appreciated.

In the earlier case of *Mowry v. Whitney*, 14 Wall. 620, the patent was upon a process for annealing cast-iron railroad car wheels. The Court, in denying the patent holder damages based upon the whole profit made by the infringer, pointed out that many inventors may have held patents which contributed to the value of the finished product. To allow each a recovery of the full profits upon sale of the article would mean that "an infringer might be mulcted in several times the profits he had made from the whole manufacture" (p. 651). See also, *Seymour v. McCormick*, 16 How. 480, 487.

It would seem beyond dispute that neither Haggerty nor Roos could be said to have contributed by their inventions more than a fractional value

to the gypsum board sold by appellees. It was Utzman who made the "superior" closed-edge board, and inventors before him had contributed the basic patents on board. The above cases establish that in a suit for infringement Haggerty or Roos could recover no more than the value which their inventions contributed to the finished product.

It is submitted that, for similar reasons, neither the Haggerty nor Roos inventions were of an order to justify price control of the commercial product, wallboard. To permit price control in such case would be to give the patentee a "pecuniary reward" not only for his narrow patent improvement, but a much larger reward from the sale of wallboard itself in a noncompetitive market. He would gain a business profit, not merely a reward for his invention. Here, as in the case of the tool, appliance, or process patents, discussed above, to sanction price control would be to permit the patentee to extend his patent monopoly far beyond the reward due to his invention. The facts of this case disclose that the holder of a narrow improvement patent, *when armed with the right to offer price control to his competitors*, can exert enormous power to eliminate competition and regiment an industry. Such a power to nullify the economic policy declared by Congress in the Sherman Act should be conferred sparingly, if at all.

III

APPELLEES HAVE CARRIED PRICE CONTROL AND INDUSTRY REGULATION BEYOND ANYTHING REASONABLY ADAPTED MERELY TO SECURE PECUNIARY REWARD TO USG FOR ITS PATENT MONOPOLY

The evidence is undisputed that appellees have in fact organized the gypsum industry and stabilized prices. They have discontinued the sale of all board but that allegedly manufactured under USG's patents; they have discontinued the sale of No. 2 board and seconds for which there had been a substantial market; they have standardized board sizes; they have adopted a uniform method of packaging; they have adopted a uniform delivered price system; they have adopted arbitrary billing weights; they have prescribed minimum car and mixed car weights; they have agreed upon uniform switching and carriage charges; they have regulated the amount of dunnage; they have prescribed minimum truck load sizes; they have agreed upon the areas in which truck deliveries can be made; they have prohibited truck deliveries to the job-site; they have agreed to minimum pick-ups at mills; they have agreed not to rent the warehouses or trucks of a dealer; they have agreed upon the classes of customers and upon the particular persons in certain of those classes to whom they will sell; they have discriminated between customers within the same general class; they have agreed upon the manner in which price quotations shall be made; they have agreed upon

the terms of discount and the medium of payment; they have prohibited the employment of commission salesmen and sales upon consignment; they have proscribed certain types of advertising; and they have tampered with the price at which unpatented products may be sold.

Nothing in the *General Electric* case requires the Court to sustain any such system of private regimentation.

The *General Electric* case does not hold that conditions on the method and price of sale comparable to those imposed by General Electric on Westinghouse are legal under all circumstances. This is implicit in the critical language of the opinion. Thus the Court said that a patentee may grant a license to make, use and vend, "upon any condition the performance of which is reasonably within the reward which the patentee by the grant of the patent is entitled to secure" (p. 489). And again (p. 490):

If the patentee goes further, and licenses the selling of the articles, may he limit the selling by limiting the method of sale and the price? We think he may do so, *provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly.*

The notion that the *General Electric* case holds that there is inherent in the patent grant an unrestricted right to fix the methods of sale and minimum prices must rest upon the assumption that

the exercise of this right will never result in an enlargement of the patent grant or that any enlargement which may result is sanctioned. Both of these assumptions are negated by the *Masonite* case. The *del credere* agency agreements there involved were regarded as "license[s] to vend" a patented product (p. 277). Each of the agreements fixed the minimum price at which the agent might vend the product. Thus as here and as in the *General Electric* case, the question was the legality of conditions imposed on the right to vend. The *Masonite* agreements were held to result in "an enlargement of the limited patent privilege" (p. 279) and were condemned for that reason. In reaching this conclusion the Court said (p. 280):

In the *General Electric* case, the Court thought that the purpose and effect of the marketing plan was to secure to the patentee only a reward for his invention. We cannot agree that this is true here.

It is not sufficient, therefore, merely to compare the provisions of the license agreements and bulletins in the *General Electric* case with those in the present case. The purpose for which the restraints were imposed, their extent and the factual context in which they operate are decisive factors.

It was assumed in the *General Electric* case that the patents of General Electric gave it the power to "control 100 percent of the electric-lamp busi-

ness of the United States" (*supra*, p. 223). And it was in this factual context that Chief Justice Taft said that when a patentee licenses another "It would seem entirely reasonable that he should say to the licensee, 'Yes, you may make and sell articles under my patent, but not so as to destroy the profit that I wish to obtain by making them and selling them myself'" (p. 490). In other words, the Court regarded price-fixing as a purely protective device to safeguard a patentee in the enjoyment of his patent monopoly.

The district court was of the view that the *General Electric* case sustained the validity of license agreements the terms and conditions of which were not materially different from those in the present case, and that each and all of appellees' activities under the licensing arrangement, including price control, are "reasonably and normally adapted to secure to USG the pecuniary reward for its patents and do not go beyond the limits of the monopoly granted by the patent laws" (Fdg. 28, R. 4148).

As to the first of these conclusions, it is clear that this Court's opinion in the *General Electric* case did not consider restrictions of the various types involved here. It is true that examination of the record in *General Electric* will disclose that the pricing regulations there established by contract were detailed and complicated, and controlled many aspects of the licensee's business—though not,

in our opinion, to the extent involved here." But a line-by-line comparison of USG's price bulletins with the *General Electric* agreement is unnecessary.⁸¹ For in the *General Electric* case the Government stood on the basic proposition that no price control at all should be permitted, and the question principally debated was whether the *del credere* agency plan involved a sale with unlawful resale price control. There was no assignment of error and no discussion in the briefs or in the Court's opinion as to whether each or any of the many price regulations employed were "reasonably adapted" to secure proper reward for the *General Electric* patents. The Court was thus not called upon to examine these regulations or to determine their validity. The question now presented, therefore, only lurked in the record of that case, and the decision is not, under established principles, to be regarded as a precedent as to such matters. *Webster v. Fall*, 266 U. S. 507, 511; *KVOS, Inc. v. Associated Press*, 299 U. S. 269, 279.

⁸¹ This will appear from a comparison of the summary of the *General Electric* agreement in the opinion below (R.3987-3999) with the facts of the instant case as summarized at pp. 102-160, *supra*.

⁸² We do not, of course, concede that the conditions in the *General Electric-Westinghouse* license went no further than normally and reasonably necessary to secure a pecuniary reward for the patentee's monopoly. Since crucial facts in the *General Electric* case and the present case differ, it is not now necessary to discuss this question.

A brief review of what appellees have done under their licenses will show that they have gone far beyond what is necessary to secure a reasonable pecuniary reward for their patents.

Price.—The facts of the present case afford dramatic illustration of the improper use of price control. It is not disputed that during the years 1927, 1928 and 1929 the price of Sheetrock manufactured by USG had dropped from \$30 to \$25 to \$20 and lower in competition with open-edge board. In many markets Sheetrock was not sold at all but Crown, a cut rate closed-edge board, was being sold by USG at prices as low as \$16 per thousand. *Supra*, pp. 38-40, 53-55, 67-68.

While these conditions were spoken of as a "price war", nevertheless they establish that, in free and open competition with unpatented board the so-called Utzman closed-edge board, a "superior" product, could not command a price better than from \$16 to \$20 per thousand—which was about two dollars higher than open-edge board (Ex. 620, R. 6411). It is submitted that these figures measure the value of USG's Utzman patent as compared to unpatented board, and thus demonstrate with the clarity of a laboratory test the actual extent of the pecuniary reward to which the owner of the patent at that time was entitled.

Once the licenses were generally signed in May 1929 and competition (including that from open edge board) eliminated, the price of wallboard

was rapidly pushed up to \$22.50 per thousand on July 9, 1929 (Ex. 414, R. 6106), and thereafter, during a period of depression and falling prices, to a high point in 1934 of \$28.50 per thousand. At the same time, as the appellees fully understood and intended (R. 622, 5298, 910), the price of plaster and related products "improved." (Fdg. 74, R. 4158). Ordinarily, perhaps, it would have to be assumed that these prices were merely the normal reward due to the patentee's monopoly. On the face of the present record, however, no other conclusion can be drawn, it is submitted, than that USG was reaping a reward where it had not sown; its price control was "unreasonable" and an unlawful extension of the patent grant.

Indeed, when it is considered that during the years 1930 to 1935 the only "principal" patent on which price control could be based was the Haggerty "starch" patent, the case is even more striking. The facts as to the importance of this patent and the manner in which appellees seized upon it as a support for price fixing when the Utzman patent was about to expire have already been related. See pp. 73-87, *supra*. Moreover, this patent was owned by Universal, which was also an early licensee under Utzman. Nevertheless, Universal was unable to do better than USG in maintaining the price for its board in open competition (R. 3573); during this very period

it was in receivership. It is simply inconceivable, therefore, that the high prices which appellees charged the public for board during the five years, 1930-1935, had any relation to what was proper pecuniary reward to USG as purchaser of this patent.

The same is true of the other conditions in this case.

Standardized Product.—One of the first steps appellees took was to price out of the market No. 2 board, seconds and open-edge board, for all of which there had been a consumer demand. No. 2 board and seconds were eliminated by an agreement among appellees that they be sold at the same price as No. 1 board. Obviously, no one would purchase the seconds and No. 2 board under these circumstances. Open-edge board was eliminated in part by the provision of the license agreements requiring the payment of the same royalty on the unpatented open-edge board as on the closed-edge board (R. 2983, see pp. 108-114, *supra*). In addition, all board has been standardized as to size by agreeing upon price differentials for other sizes bearing no relation to the variation from standard and prohibitively costly. And a uniform system of packaging was adopted. This complete standardization was accomplished by agreement and was possible only because all manufacturers were parties to the combination.

Basing Points and Uniform Billing Weights.—Appellees have adopted a uniform multiple

basing-point delivered-price system. All mills are not basing points, with the necessary result that the net return to the vendor differs between customers similarly situated. Appellees have implemented this system by prescribing uniform billing weights which require a manufacturer either to absorb a freight cost or charge the purchaser with "phantom" freight, depending upon whether the board which it manufacturers is heavier or lighter than the arbitrarily agreed upon billing weight. The result is price discrimination probably in violation of Section 2 (a) of the Clayton Act. See *Corn Products Refg. Co. v. Federal Trade Commission*, 324 U. S. 726; *Federal Trade Commission v. Staley Mfg. Co.*, 324 U. S. 746.

Uniform Methods of Delivery and Regulations of Trucking.—USG has established for the industry uniform methods of delivery. USG permitted deliveries by truck of certain specified minimum quantities in certain specified areas at a delivered price. In all other areas the licensee was required to charge the prohibitive less than carload price for truck deliveries (*supra*, pp. 118-119). The result is that USG and not the consumer determines when shipment by truck will effect savings; and USG regulates the competition between truck and rail. The bulletins, in addition, prohibited the delivery of board to the job-site and required that it be delivered first to the dealer's warehouse, and then re-transported to the job-site (*supra*, pp. 145-

147), which often was uneconomical. USG has also specified the amount of dunnage which may be used in shipping board.

Elimination of Jobbers.—It cannot seriously be disputed that jobbers, as defined in the license agreements and as that term is commonly employed, have been eliminated from the gypsum industry by means of appellees' agreement to charge the the same price as was charged to those who constitute the customers of the jobbers. The only possible pretext for eliminating jobbers is that appellees could not lawfully control the resale price of jobbers and therefore their price competition. *Boston Store v. American Graphophone Co.*, 246 U. S. 8.

Manufacturing Distributors.—While denying a discount to jobbers, appellees have granted a discount to so-called manufacturing distributors. These manufacturing distributors differed from other jobbers only in that they also manufactured gypsum products other than board. These manufacturing distributors, already engaged as they were in the manufacture of gypsum products, were natural potential competitors of appellees. In addition, they possessed an incentive to manufacture board since their competitive position in the sale of gypsum products would be weakened if they were unable to sell a full line of products. By granting them the right to purchase at a discount, appellees removed at least one of their incentives for entering the board business. More

over, appellees agreed to sell only to those manufacturing distributors approved by USG. This permitted appellees to control the prices at which the distributors resold board.

Prices of Unpatented Products.—Appellees have refused to sell board to a manufacturer²² who sold plaster, an unpatented product, below prevailing industry prices. The complete exclusion of this manufacturer from trade in all board was of course possible only because all manufacturers of board were parties to the combination. In addition, appellees have agreed that they will not reduce the price of plaster or other products for the purpose of influencing the sale of board.

Board Survey.—USG organized a separate corporation in 1932 to police the license agreements. Not only were the sales of licensees subject to scrutiny and investigation but those of USG as well (Fdg. 20, R. 4143). Nothing of the sort was done in the *General Electric* case. Obviously, when USG joined with the others and permitted its own prices and practices as well as theirs to be policed, it was giving up a right under the general law and not merely protecting its patent monopoly. It would not have needed to be protected against itself, if it were not that it was cooperating with the licensees to eliminate price competition. Cf. *Pfotzer v. Aqua Systems, Inc.*, 162 F. 2d 779 (C. C. A. 2).

²² *Cardiff*, see pp. 149-151, *supra*.

Licensee Meetings.—A great many matters having to do with the detailed regulation of the industry were taken up by the appellees at licensee meetings. Among the matters discussed were commission men; these were eliminated. Trade discounts were fixed at 30 days net, 2 per cent 10 days. It was even sought to regulate the medium of payment, inasmuch as National had taken Chicago Worlds Fair bonds. Consignment sales and the establishment or continuance of warehouses at a dealer's place of business were proscribed (*supra*, pp. 142-143). USG also prohibited certain types of advertising, such as donations to a dealer for its baseball club, donations or sales below cost of carpenters aprons and the painting of signs on dealers' fences (*supra*, pp. 147-149).

We think it obvious that none of these restrictions could have been accomplished except by agreement among all the manufacturers in the industry. None bears any direct relationship to the USG patents, although all have in common the element of elimination of methods of competition which might lead to lower prices. None in our opinion is reasonably adapted to the securing of a proper pecuniary award for the patents nor designed to protect the licensor in the enjoyment of its patent monopoly. The notion that appellees must be permitted to control the price of related products in order to make price control effective was repudiated in *Mercoïd Corp. v. Mid-Continent*.

Investment Co., 320 U. S. 661, 666, where the Court said:

The necessities or convenience of the patentee do not justify any use of the monopoly of the patent to create other monopolies.

Cf. *B. B. Chemical Co. v. Ellis*, 314 U. S. 495, 498.

It has been possible, of course, only to consider one of appellee's activities at a time. But only when they are looked at as a whole can their full import be appreciated. The result of the restrictions imposed under the licenses has been a complete regimentation of the industry not proportioned in any sense to the normal values of the patents themselves. The court below found, and appellees argue, that each type of restriction bore a relation to the price of gypsum board, and hence that each came within the *General Electric* doctrine. We do not deny that there was a relation between the price of board and such restrictions as, for example, the refusal to permit deliveries of goods to the job-site or sales on consignment.³³ It can be said that if one licensee sells on consignment he may take trade from another, or from USG, and hence, possibly, diminish to some extent the profit which USG or such other licensee may have expected to make.

³³ It is difficult to see, however, how the refusal to sell board to Cardiff because of fear that it might reduce the price of the plaster it manufactured and sold bore any relation to the price of board.

It is clear that if a patentee may control and regulate under the *General Electric* doctrine all business activities which have any relation to the price at which the patented product is sold, the result will be an extension of the patent privilege over matters clearly not within the patent grant. Thus, for example, appellees apparently treated sales of plaster by a manufacturer of board at what they regarded as sub-normal prices as a method of reducing the price of board. It may be true that dealers will prefer to purchase board from manufacturers who will furnish plaster at reduced prices. But nevertheless, to prevent manufacturers who sell board from reducing the price of unpatented plaster clearly is allowing the owners of the patent on board to "tamper with" the price of an unpatented commodity: Cf. *United States v. Socony Vacuum Oil Co.*, 310 U. S. 150, 221.

Such a result would be clearly inconsistent with the many cases in which this Court has held that patentees may not so extend the scope of their patent monopoly. We do not believe that such practices can be regarded as normally and reasonably adapted to secure a pecuniary reward for the patent monopoly, under the *General Electric* case.

IV

IF APPELLEES' COMBINATION IS SANCTIONED BY THE
GENERAL ELECTRIC CASE, THAT CASE SHOULD BE
OVERRULED

Even if the district court's findings are fully accepted, the facts of this case show a price fixing

system going far beyond anything legitimate under the patent law and clearly inconsistent with the policy and provisions of the antitrust law. We think this appears from the face of the opinion of the court below. That court felt that it was required by the *General Electric* case to sustain the validity of such a combination. The very fact that the *General Electric* doctrine can be thought to go that far suggests its unsoundness. We submit that if this Court is of the view that appellees' price fixing combination is sanctioned by the *General Electric* decision, that decision should be re-examined and overruled.

In our brief filed last term in *United States v. Line Material Co.* (No. 8, this Term), p. 40-68, we have set forth at some length the reasons why we are convinced that the *General Electric* case was wrongly decided. We reaffirm that argument here; in the interest of avoiding repetition the Court is respectfully referred to the *Line* brief for our basic theory as to why the *General Electric* case is unsound. In what follows it is proposed briefly to apply the arguments there presented in the context of this case.

A. THE RULE IS UNCERTAIN AND DIFFICULT OF APPLICATION

It is, of course, clear that if the *General Electric* case means that all prices and conditions imposed by a licensor upon his licensee are proper so long only as they are related in some degree, however remote, to furnishing pecuniary reward

to the inventor—or his corporate assignee—there would be little difficulty in applying the case, however horrendous the result. However narrow the patent, or however extensive the regulation, all would be proper.

The Court has never applied the rule to sanction such a result. The holder of a patent is not to be given a blanket authority to carve out such exceptions to the antitrust laws as he may see fit. The line of cases beginning with *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U. S. 502, which holds that a patentee may not require the purchase of unpatented products from himself, shows clearly that “pecuniary reward” to the patentee is not the sole test, since the patentee unquestionably would get financial “reward” from such an arrangement. Likewise in *United States v. Masonite Corp.*, 316 U. S. 265, 280, the Court said clearly enough that a patent may not be used both to get a pecuniary reward for the patentee and also to enhance his trade position by bringing all erstwhile competitors together under price control to eliminate competition.

But apart from these instances, to give a construction to the *General Electric* doctrine limited only by the words “pecuniary reward” would be to ignore the plain words of the opinion. Chief Justice Taft did not say that a patent holder may fix a licensee’s prices and methods

of sale as he sees fit. He said the patentee may do so: "provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly." These words, however difficult of application, may not be read out of the case.

The empirical test laid down by the Court is deceptively simple. When, however, are conditions of sale "normally and reasonably" adapted to secure pecuniary reward? And, when is the "patent monopoly" one of a scope and importance sufficient to merit pecuniary reward derived from control of a licensee's prices? The opinion is almost devoid of explanation except as the Court says (p. 490): "The higher the price, the greater the profit, unless it is prohibitory." Common observation will show that this statement is doubtful economics; in many cases a lower, not a higher, price will produce greater profits, or pecuniary reward.

The facts of this case give dramatic illustration of the difficulty of determining what price is normally and reasonably adapted to secure pecuniary reward to the patent holder for his invention. In the first place, as has been demonstrated *supra*, (pp. 38-40, 53-55, 67-68), the Utzman board could not command better than \$20 in 1928-1929 in active competition with unpatented open-edge board. With competition eliminated the price was raised sharply *supra* (pp. 103-105). This evidence,

it is submitted, is a complete demonstration that USG, and its licensees were obtaining "pecuniary reward" not proportioned to what was due as a reward for the patent, but reward which could only come from the elimination of competition.

But, we are fortunate in having that evidence in this case, because there was a period before the price fixing scheme became effective in which the patented product was forced to compete with unpatented board. This was not so as to the Roos patents. In subsequent years, assuming industry operations under the Roos "foam" patents, there is no way of applying the test as to price. The parties, being all the manufacturers in the field, could charge whatever they saw fit. There was not the long established test of a competitive market to put some check on the patentee. And, while it is true that a patent holder may sell at such prices as he sees fit, it by no means follows, as it is submitted the Court in the *General Electric* case recognized by its proviso, that the patent holder may reach out by contract and impose those prices upon his licensees. Or where, as here, his licensees are willing victims, upon the buying public.

When it comes to determining the "reasonableness" of the "methods of sale" which may be imposed, there is even more difficulty. If "pecuniary reward" were the sole test, aside from any question of reasonableness, the patent holder

could tie an industry up tighter than a drum. In fact that is substantially what has been done here. But when the question is posed as to where to draw the line, that is, as to what trade practices are "reasonably adapted" and what are not, there is no certain guide laid down in the decision.

To illustrate by one of the questions in this industry, discussed *supra* (pp. 147-149), consider the matter of painting dealer's fences. Many complaints were made to Board Survey that one or another of appellees had painted too far. In painting the sign he had painted the fence, and hence might be said to have given the dealer a price concession in the sale of patented board. But, within the *General Electric* doctrine, how far may USG or a licensee go in painting a sign advertising his wares on a dealer's fence? To state the question is enough to show the difficulty of answering it. The same is true of a great many questions discussed *supra* (pp. 147-149). But appellees, nonetheless, proceeded to legislate, all ostensibly under the doctrine of the *General Electric* case, with the result that the industry is now completely regimented.

Turning now to the patent aspect of the decision, the same uncertainty is presented. Assuming as we do, that the Court will declare that no patent other than an article patent will justify price control, the problem is by no means answered. The Court in the *General Electric* case

had before it patents which were deemed to cover completely the making of the tungsten filament lamp and to give the company control of the lamp industry. But when narrow improvement patents are used for price control purposes, as in the present case, an entirely different situation is presented. Surely the most narrow and unimportant improvement patent will not suffice; but where is the line to be drawn?

One of the problems which has long vexed the patent bar is the question in infringement cases of apportioning the profits derived by an infringer upon a wrongful sale of the patented product. In the early case of *Seymour v. McCormick*, 16 How. 480, the inventor of a seat to be used on a harvester claimed the entire profits upon sale of the harvester by an infringer. That case was easily disposed of by denying the contention, but in succeeding years the problem has come up in many ways and proved very difficult of solution. See *Westinghouse Co. v. Wagner Mfg. Co.*, 225 U. S. 604, 614, and cases cited. There is no certain test, likewise it is submitted, of when a particular patent has so far contributed value to an article that price control of the article could be justified under the *General Electric* doctrine.

Of course the Court could say, as a matter of convenience, that the holder of a narrow improvement patent or of a process patent should be

permitted to control the price and methods of sale of his licensees. Such a rule would at least be easy to apply—unless more than one person owned patents relating to the same article. But that, it is submitted, would not be giving the patent holder a pecuniary reward for his invention alone. On the other hand, price fixing limited to the patentee's invention would, of course, be difficult if not impossible of practical use; buyers pay one price for the finished product, not several prices apportioned to each inventor's contribution. But, as this Court has said in a similar situation, the convenience of the patent holder is not to be consulted as a test of his patent rights. "The necessities or convenience of the patentee do not justify any use of the monopoly of the patent to create another monopoly" *Mercoird Corp v. Mid-Continent Co.*, 320 U. S. 661, 666.

The result is that a highly unpredictable situation has been created, where relative certainty should prevail. In the present case, as the lower court found (Fdg. 31, R. 4148), the appellees fashioned their combination in supposed compliance with the holding in the *General Electric* case. The Government submits, on the other hand, that appellees have gone far beyond what was essential to the "protection" of their patents, as said in the *Standard Sanitary* case, and have entered the field denounced by the Sherman Act.

Although the present case might, as urged in Point I, be decided without reaching the *General Electric* case, a further expression of the Court should be made either to clarify the test announced in the *General Electric* case or to abandon it. We submit that the Court should adopt the position it has taken in the case of ordinary price fixing agreements, and abandon any attempt to ascertain whether the price and methods of sale imposed by a licensor upon a licensee are reasonably adapted to secure pecuniary reward for the patentee's monopoly. All such control by a licensor should be declared unlawful.

It will be noted, of course, that the patentee would not by such a holding be denied a proper reward for his invention. He would still be entitled to make such profit as he properly could from the exclusive right to make, use or vend the article in a competitive market, or, if he saw fit he might forego his patent protection and license others on a royalty basis. If he wishes to maintain a very high price for the patented article he may make the royalty correspondingly high; but he certainly is entitled to no more than the superiority of the patented product will command in the market. There is no suggestion in the present case that such a royalty would not have given adequate protection to USG, the dominant manufacturer in the gypsum industry, for its patent monopoly, assuming its patents to have

been valuable. But, for the Court to fashion other means to secure reward for the patentee by giving him control over his licensees' prices and methods of sale, and then to attempt to limit that right by saying it may only go so far as necessary to protect the patentee in the enjoyment of his patent monopoly, is to create a rule which, whatever else may be said of it, is impossible of administration.

Here, as the Court said in *United States v. Trenton Potteries*, 273 U. S. 392, with respect to "reasonable prices," conditions of sale which may be "reasonably adapted" properly to secure pecuniary reward to an inventor at a given time, or under certain conditions of the market, may become entirely unreasonable at a subsequent time. And, not only is the rule difficult of administration but, by similar token, from the point of view of industry and business, it affords no certain guide to lawful action. The language of Mr. Justice Stone puts the matter with complete clarity (p. 398):

Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies.

B. THE RULE LEADS TO CONSEQUENCES OF A SORT CONDEMNED BY
THE ANTITRUST LAWS

The rule, though announced as a means of protecting a patent holder in the enjoyment of his patent monopoly, lends itself readily to the accomplishment of restraints of trade. Once it is granted that a patent holder may go into the market and offer not only the use of his patent, but price protection as well, he has been given a powerful weapon with which to subvert the purposes of Congress as declared in the Sherman Act.

It is clear that the situation long existing in the gypsum industry is exactly the opposite of what should exist in a free economy. Prices are fixed, the commodity is standardized, methods of sale are regulated and all competition at whatever level is eliminated. Such things are a more or less inevitable consequence of the rule that a patentee may fix his licensee's prices, regardless of how carefully the Court may seek to condition the right. The additional reward which the rule may give the patentee to which he is fairly entitled, if any, is to be balanced against the very great potentialities for harm to the public which the rule possesses.

That the right to fix prices leads to the elimination of all competition can easily be demonstrated on the facts of this case. Consider for example, the situation of Beaver in 1926 after it had signed the USG-Beaver license agreement (R. 39).

Waiving all question of whether Blagden intended by signing the agreement to organize the gypsum industry and stabilize prices, as he probably did, that is exactly what anyone in his situation would be persuaded to do. Blagden appreciated that price control would not be successful unless all other members of the industry were likewise under license. He frankly told Avery that unless general recognition of the USG patents were obtained it would be necessary to reduce prices in order to meet the competition from open-edge board. (Ex. 185, R. 5346.) Moreover, as promised (Ex. 185, R. 5346), Blagden proceeded to contact the various members of the industry to persuade them to take out licenses. In talking with Brown of Certain-teed, for example, he said: "I told him that, undoubtedly, if he were in with the others he would get the benefit of stabilization" (R. 831). In other words Blagden recognized that the obvious way to correct his competitive disadvantage due to the royalty, as well as to meet the competitive threat, was to get everyone into the same boat, so to speak. Then, with that accomplished, as Blagden further told Brown, prices could be stabilized (R. 831).

Price control makes each licensee, almost of necessity, an ardent proponent of industry wide licensing. Consider further the case of Universal, one of the early licensees. The company, caught in a sharp competitive fight, went into

receivership, although it alone had both the starch patent and the license for Utzman. Holland, like Blagden, felt impelled to do everything he could to talk the industry into coming together under the licenses (R. 932). He definitely wanted to have prices stabilized, not only for board but for all industry products, and the USG license agreement with price control afforded him a means to that end (Ex. 147, R. 5298). The court below in its opinion said, in fact, that Holland's actions were all for the very purpose of helping his company and the others "out of their unfortunate financial situation" (R. 4114). No better illustration could be given of the cumulative force of the right to control prices.

Whether the patent is important or not, moreover, becomes a matter of secondary consequence when price control is involved. Haggerty, of National, was very much concerned about what could be done about price control after the Utzman patent expired on August 6, 1929 (Ex. 205, R. 5370). Holland explained, "you will remember that Mr. Avery made it very clear to us that if this plan could not be worked out on the Utzman patent that there were other patents available * * *" (Ex. 206, R. 5371). What the other patents were was incidental; it was enough for Haggerty and Holland and Avery, at least, that there were other patents available.

Weak and dubious patents will serve, if no others are available. The Haggerty starch patent, for example, had been known to the industry for several years before it was suddenly promoted to a place of importance in the summer of 1929. According to Brown there was "some doubt as to the strength of this Starch Patent" (Ex. 231, R. 5403). Then the idea was conceived of using both the starch and the bubble patents "so a combination of the two systems would give a patent to work under" after the Utzman patent expired in August and pending the time when the Roos bubble patents should issue (*ibid*). Whether the combined patents were useful was again a matter of minor concern; the important thing was to have some patent so that "patent control" would "continue without a break" (Ex. 231, R. 5404).

Moreover, once a licensing arrangement has been set up in an industry, the same force that created it serves to maintain it. The parties all agree, as in this case, not to contest the validity of any of the patents, irrespective of how invalid or how limited in scope they may be. And, though other patents of equal or even superior worth may be at hand, there is less incentive to use them, since to do so might upset the price control arrangement. Of course, it is not to be supposed that all research will be discontinued, since it is essential to have new patents of some

sort available if for no other reason than to permit a perpetuation of price control.

But these are only the more obvious consequences of the rule. Once an industry embarks on price control there is no logical stopping place. Today they fix the price of board; tomorrow it becomes necessary to police the sales of plaster and related products sold in conjunction with board. Since jobbers may sometimes cut the resale price of board, as they have the legal right to do, jobbers are eliminated. The rule has far reaching and unpredictable consequences, inimical to a free economy.

Quite apart from any question as to the legality of these actions, it is surely demonstrated that price control is a powerful inducement to bring about a complete elimination of competition. As the Court said in *United States v. Masonite Corp.*, 316 U. S. 265, 281:

The extent to which that inducement in a given case will have or has had the desired effect is difficult, if not impossible, of measurement. The forces which that influence puts to work are subtle and incalculable. Active and vigorous competition then tends to be impaired, not from any preference of the public for the patented product, but from the preference of the competitors for a mutual arrangement for price-fixing which promises more profit if the parties abandon rather than maintain competition.

C. PRICE CONTROL TENDS TO DEFEAT THE OBJECTIVES OF THE
PATENT LAWS

The primary objective of the patent laws is the encouragement of invention, reward to the patentee, as this Court has often said, being secondary and merely a means to that end. Presumably the Court in the *General Electric* case was of the view that increasing the patentee's reward by permitting him to control his licensee's prices and methods of sale would have the effect of stimulating invention. We submit, to the contrary, that price control, instead of promoting this objective, tends to defeat it.

Necessity, it has been said, is the mother of invention. But, however that may be, profit to the inventor—or to his corporate employer—is not an inconsiderable inducement. The Court in the *General Electric* case appears to have based its decision, in part, on the assumption that the greater the reward that can be heaped on a single inventor, or his corporate-employer, the greater will be the inducement to invention. And, hence, the patent system will serve that much more certainly “to promote the progress of Science and useful Arts” (Const. Art. I, Sec. 8).

The facts of this case demonstrate the error of that assumption. Price control, instead of encouraging invention, has destroyed the principal incentive to research and discovery. Since 1929 the gypsum industry has been held in a patent strait-jacket, so to speak. Unless the arrange-

ment is declared illegal, it will continue until 1954, when the third Roos foam patent expires, and beyond that indefinitely if appellees can find some other minor improvement or process patent to serve as an excuse for its continuation. But, so long as USG fixes a price at which everyone can make a relatively sure and noncompetitive profit, there is no need either for USG or anyone else to bestir himself to develop a new or better product.

The real value of a patent, as measured by what royalty it could command on its merits, is completely distorted when it is offered with price control. The licensee buys price protection. And, though the royalties amount to a substantial sum, as Avery reported to his shareholders in 1929 (Ex. 332, R. 5986), the principal advantages both to licensor and licensee lie in the *general* manufacture and sale of a uniform product. The licensee recoups his royalty payments from the enhanced price to the public, and the licensor makes both that profit, which he could not get except for the price control provisions, plus the royalties.

The price control system, however, not only removes the incentive to invent; it, for the same reason promotes the use of narrow and doubtful patents. The members of the industry most affected and who might be relied upon in defence of their own business life to contest the validity of such patents, customarily agree to keep quiet

in the interest of profits. In this case USG insisted from the beginning that each licensee must recognize the validity of the USG patents and, in the case of the Roos "foam" patents, the licensees covenanted five years before they were issued not to contest validity.

The consequence is both unfair to the public and destructive of the purposes of the patent system. As this Court has said: "It is as important to the public that competition should not be repressed by worthless patents, as that the patentee of a really valuable invention should be protected in his monopoly." *Pope Mfg. Co. v. Gormully*, 144 U. S. 224, 234. The patent system rests on an assumption that a patentee by contributing a valuable discovery is entitled to a reward; to the extent that price control distorts the usual test of patent importance and restrains those who would ordinarily be impelled to contest invalid patents a reward is given where none is earned. In such measure price control is destructive of the patent system itself.

The importance of these considerations to the public has been recognized by this Court. In *Sola Electric Company v. Jefferson Electric Company*, 317 U. S. 173, a price control case, the Court refused to apply the rule that a licensee may not contest the validity of his licensor's patents where to do so would "fasten upon the public as well as the petitioner the burden of an

agreement in violation of the Sherman Act * * * (p. 177). And, more recently this view was stated to be "firmly grounded upon the broad public interest in freeing our competitive economy from the trade restraints which might be imposed by price-fixing agreements stemming from narrow or invalid patents." *Katzinger Co. v. Chicago Metallic Mfg. Co.*, 329 U. S. 394, 400.

These cases, it will be noted, go so far as possible on their facts to aid the licensee in freeing the patent system of narrow and invalid patents. But they represent the unusual situation, where some licensee finally decides to break away from the price fixing combination. The root of the matter, though, is price control, which, as in the present case, is often the principal inducement to the creation of such combinations in the first place. The Court should not hesitate now, it is submitted, to take the next step and deny altogether the right of a licensor to bring his competitors together by means of a price control license.

In so doing, of course, the Court would not rest its decision solely on the tendency of price control to give currency to doubtful patents. The rule of the *General Electric* case, in actual operation, destroys the incentive to invention, contrary to the basic purposes of the patent laws; it tends almost inevitably, as in this case, to the sort of restraints condemned by the Sherman Act; it is

difficult of administration, and affords no certain guide to business; it provides a "reward" to the inventor, not suggested by Congress, where so far as appears a royalty would be wholly sufficient. For these reasons, we submit, the *General Electric* case should now be overruled.

V

IN A PROCEEDING UNDER SECTION 4 OF THE SHERMAN ACT, THE GOVERNMENT MAY SHOW THE INVALIDITY OF PATENTS RELIED UPON TO JUSTIFY A PRICE FIXING COMBINATION

Up to this point we have argued that, even assuming USG's patents to be valid, appellees' conduct was in violation of the Sherman Act. The Court need reach the issue here discussed as to the Government's right to assert the invalidity of the patents only if it rejects each of our prior arguments. However, the question is of such importance in the administration of the anti-trust laws and the patent law that we submit a decision on this point would be in the public interest.

Appellees have pleaded that their price fixing combination is justified because it operates under the protection of "valid patent monopolies" conferred upon USG by the ownership of patents. The only so-called "principal patents" now owned by USG and upon which price fixing could be justified are the three Roos "foam" patents. The validity of none of these patents has been tested. The Government pleaded in rebuttal, by amending its complaint, that each of these patents was

invalid for numerous reasons such as lack of invention, indefiniteness, etc. (R. 349). Appellees moved to strike these allegations, or, in the alternative, for partial judgment dismissing that part of the Government's complaint. The court (Bland, J. dissenting) rendered an opinion holding that the Government was without power to attack the validity of these patents (R. 369-395), and entered an order granting appellees' motion (R. 396).⁸⁸

The novel question presented by this ruling may be simply stated: A price fixing agreement based upon an invalid patent is a violation of the Sherman Act. *Sola Electric Co. v. Jefferson Electric Co.*, 317 U. S. 173; *Katzinger Co. v. Chicago Mfg. Co.*, 329 U. S. 394; *MacGregor v. Westinghouse Co.*, 329 U. S. 402. Section 4 of that Act provides that "*it shall be the duty of the several district attorneys of the United States * * * under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.*" The question is whether Congress meant what it said, or whether an exception in favor of violations based upon invalid patents should be read into the general directive of Congress. The Court has not passed upon this precise question, but we submit its

⁸⁸ The correctness of the lower court's holding is considered at greater length in Steffen, *Invalid Patents and Price Control*, 56 Yale L. J. 1. See, in addition 53 Yale L. J. 579, 57 Harv. L. Rev. 387.

decisions in analogous situations negatives the existence of any such exception.

There is a "broad public interest in freeing our competitive economy from the trade restraints * * * imposed by price-fixing agreements stemming from narrow or *invalid* patents." *Katzinger Co. v. Chicago Mfg. Co.*, *supra*, at p. 400. So overwhelming is this public interest that a private individual acting solely for his personal pecuniary profit may establish the violation of the Sherman Act by showing the invalidity of the patent on which it is based, despite the fact that he has by agreement with the patentee acknowledged and agreed not to question the validity of the patent. See *Sola Electric Co. v. Jefferson Electric Co.*, *supra*; *Katzinger Co. v. Chicago Mfg. Co.*, *supra*; *MacGregor v. Westinghouse Co.*, *supra*. In the *Sola* case the Court said in emphatic terms (p. 177):

Local rules of estoppel which would fasten upon the public as well as the petitioner the burden of an agreement in violation of the Sherman Act must yield to the Act's declaration that such agreements are unlawful, and to the public policy of the Act which in the public interest precludes the enforcement of such unlawful agreements.

The present case is not a mere private litigation. It is not instituted to favor one individual at the expense of another. The Government has

brought this suit, pursuant to Congressional command, to protect the "broad public interest" referred to in the *Katzinger* case, *supra*, and there is no other way in which the Government can discharge its obligation to the public. Under such circumstances it follows *a fortiori* that the Government is not estopped to assert the invalidity of USG's patents. Indeed, we think the Court recognized this to be true in *United States v. American Bell Telephone Co.*, 167 U. S. 224, when it said (pp. 264-265):

Suits may be maintained by the Government in its own courts to set aside one of its patents not only when it has a proprietary and pecuniary interest in the result, but also *when it is necessary in order to enable it to discharge its obligations to the public* and sometimes when the purpose and effect are simply to enforce the rights of an individual. In the former cases it has all the privileges and rights of a sovereign. The statutes of limitation do not run against it. The laches of its own officials does not debar its right. *Van Brocklin v. Tennessee*, 117 U. S. 151; *United States v. Nashville, Chattanooga & C. Railway*, 118 U. S. 120; *United States v. Insley*, 130 U. S. 263. But when it has no proprietary or pecuniary result in the setting aside of the patent; *is not seeking to discharge its obligations to the public*; when it has brought the suit simply to help an individual; making itself, as it were, the instru-

ment by which the right of that individual against the patentée can be established, then it becomes subject to the rules governing like suits between private litigants.

The *Telephone* case, *supra*, held that the Attorney General was without authority, under the common law or by statute, to bring an action to set aside a patent upon the bare allegation that in his opinion the Patent Office had failed to give proper weight to a prior patent. In reaching this conclusion, the Court made statements much stressed in appellees' brief and the majority opinion below which we believe serve to point up distinctions favorable to the Government. These statements are:

* * * the Government is as much bound by the laws of Congress as an individual, and when Congress has created a tribunal to which it has given exclusive determination in the first instance of certain questions of fact and has specifically provided under what circumstances that determination may be reviewed by the courts, the argument is a forcible one that such determination should be held conclusive upon the Government, *subject to the same limitations as apply in suits between individuals* [p. 268].

Least of all was it intended to be affirmed that the courts of the United States, sitting as courts of equity, could entertain jurisdiction of a suit by the United States

to set aside a patent for an invention on the mere ground of error of judgment on the part of the patent officials. That would be an attempt on the part of the courts in collateral attack to exercise an appellate jurisdiction over the decisions of the Patent Office, although no appellate jurisdiction has been by the statutes conferred [p. 269].

This holding and these statements are inapposite. The Government here proceeds upon the express authority of Section 4 of the Sherman Act. Moreover, it does not ask the Court to exercise an appellate jurisdiction over the Patent Office.⁸⁶ The proceeding does not seek the cancellation of USG's patents.⁸⁷ All that is sought

⁸⁶ The majority opinion below stated that the Government "conceded in the oral argument" that it "is seeking a judicial determination that the Patent Office erred in issuing the patents and that they are for that reason invalid" (R. 372). The Government has assigned this as error (R. 4178). The Government at no time made any such concession. The Court subsequently explained its statement by saying that it was a matter of "interpretation" (R. 736.)

⁸⁷ The majority opinion below concluded a review of the Government's prayer for relief with the statement that (R. 372-373): "Accordingly, so far as the effect upon the defendants and the patents is concerned, the distinction between this suit and an independent cancellation proceeding is not substantial." We submit that the relief we seek is for violations of the Sherman Act and would be the same and entirely proper if appellees' combination is unlawful for any reason other than the invalidity of USG's patents. See *United States v. National Lead Co.*, No. 89, 1946 Term, decided June 23, 1947. Cf. *B. B. Chemical Co. v. Ellis*, 314 U. S. 495.

is the right to show the *fact* of the invalidity of USG's patents in a direct attack upon an unlawful combination. As the Court said in *Pratt v. Paris Gas Light & Coke Co.*, 168 U. S. 255, 259, "There is a clear distinction between a case and a question arising under the patent laws." And it is settled that a private party may show the fact of patent invalidity in any case where that fact would be material to the litigation. *Becher v. Contoure Laboratories, Inc.*, 279 U. S. 388. There an action had been brought in a state court to have Becher declared trustee *ex maleficio* of a patent upon the ground that not Becher but the plaintiff was the true inventor. Suit was then brought in the district court by Becher to enjoin the state action for the reason that to permit the fact to be shown that Becher was not the first inventor would be to sanction a collateral attack which would show the patent to be invalid. This argument was effectively answered by Mr. Justice Holmes in these words (p. 391):

Again, even if the logical conclusion from the establishing of Oppenheimer's claim is that Becher's patent is void, that is not the effect of the judgment. Establishing a fact and giving a specific effect to it by judgment are quite distinct. * * *

That decrees validating or invalidating patents belong to the Courts of the United States does not give sacrosanctity to facts

that may be conclusive upon the question in issue. A fact is not prevented from being proved in any case in which it is material, by the suggestion that if it is true an important patent is void—and, although there is language here and there that seems to suggest it, we can see no ground for giving less effect to proof of such a fact than to any other.

If a private individual may ask a state court to determine the fact of invalidity when it is material to the issues, it is no more an exercise of appellate jurisdiction over the Patent Office when it is material to the issues in a suit to enforce the Sherman Act.

The district court appeared to be influenced by a notion that it would be a breach of good governmental morals to permit the Government to show the fact of invalidity. But the *ex parte* determinations of its Patent Office, based in large part upon the data submitted by the applicants themselves, are not conclusive. *Reckendorfer v. Faber*, 92 U. S. 347; *Dunbar v. Myers*, 94 U. S. 187. In the *Reckendorfer* case, which held invalid for lack of invention a patent having to do with a combination drawing pencil and eraser, the Court said (p. 351):

Before the commissioner is authorized to issue a patent, it must appear to him that the claimant is justly entitled to a patent; *i. e.*, that his art, machine, or manu-

facture, possesses all the qualities before mentioned. The commissioner must also be satisfied, that, if it possesses these qualities, it is sufficiently useful and sufficiently important to justify him in investing it with the *prima facie* respect arising from the governmental approval * * *

It is nowhere declared in the statute that the decision of the commissioner, as to the extent of the utility or importance of the improvement, shall be conclusive upon that point; * * *

The Act of June 25, 1910, 36 Stat. 851 (35 U. S. C. 68) is pertinent in this regard. "This Act which is mainly concerned with conferring jurisdiction upon the Court of Claims to entertain suits when the United States is itself an infringer of a patent, contains a provision that "in any such suit the United States may avail itself of any and all defenses, general or special, that might be pleaded by a defendant in an action for infringement, as set forth in Title Sixty of the Revised Statutes, or otherwise." This provision is significant as a Congressional belief that a patent is no more final and conclusive on the Government than on any one else. It is particularly significant in its implication that there is no impropriety in permitting the Government to question validity in a proper case. In *Slawson v. Grand Street R. R. Co.*, 107 U. S. 649, the lower court dismissed an infringement action

on the ground that the patent was invalid even though the defendant had not pleaded invalidity. This Court, in affirming the action of the lower court, said (p. 652):

We think the practice thus sanctioned is not unfair or unjust to the complainant in a suit brought on letters-patent. If they are void because the device or contrivance described therein is not patentable, it is the duty of the court to dismiss the cause on that ground whether the defence be made or not. *It would ill become a court of equity* to render a money decree in his favor for the infringement of letters-patent which are void on their face for want of invention.

We suggest that it would "ill become a court of equity", faced with the problem of ascertaining the intention of Congress, to find an intent to observe a concept of governmental morality which Congress itself has specifically failed to embrace.

In no case has this Court so much as intimated that the Government might be estopped in the enforcement of its anti-trust laws by the existence of invalid patents. The implication is definitely to the contrary. In *Standard Oil Co. v. United States*, 283 U. S. 163, the complaint charged a conspiracy to restrain trade in gasoline by means of a pool of patents covering the cracking process and a cross-licensing system. The case was tried before a Master. The Government

offered in evidence two patents to show that certain of the defendants' patents were anticipated and to show that defendants' patents were granted through error or mistake on the part of the Patent Office. The defendants objected, *inter alia*, on the ground that the Government could not introduce evidence to show the invalidity of patents (No. 378, 1930 Term, Record Vol. 1, p. 411). The matter was certified to the district court which entered an order that the evidence should be received (*ibid.*, 423-424). Subsequently, when the Master's Report came before the district court for disposition two of the questions presented were whether the Government could question the validity or scope of the patents it had issued and, if so, whether the patents were invalid (33 F. 2d 617). The court stated that it was "divided respecting the right of the government to attack the validity of the patents in these proceedings" (p. 623). The issue of the right to attack the validity of the patents was avoided by affirming the Master's finding that the patents were valid. The district court, nevertheless, found for the Government and the defendants appealed to this Court, which disposed of the present question as follows (283 U. S., at p. 181):

Inasmuch as the Government did not appeal from these findings, we need not consider any of the issues concerning the validity or scope of the cracking patents; and we accept the finding that they were

acquired in good faith. Neither the findings nor the evidence on this issue supply any ground for invalidating the contracts.

We think this case affords a measure of support for the Government in this case.

There have been, in addition, *dicta* in recent opinions of this Court in antitrust proceedings involving patents which also afford support for the Government's position. In *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436, 456, Mr. Justice Stone said, "In considering that question we assume the validity of the patents, which is not questioned here." In the *Masonite* case, 316 U. S. 265, 276, it was said, "We assume *arguendo* that the patents in question, owned by Masonite, are valid." In *United States v. Univis Lens Co.*, 316 U. S. 241, the Court said (p. 248):

The Government has not put in issue the validity of the lens patents, but argues that their scope does not extend beyond the structure of the lens blanks and consequently affords no basis for the Corporation's restrictions on the sale of the finished lenses which the wholesalers and finishing retailers fashion from blanks purchased from the Lens Company * * *

The record gives no account of the prior art and does not provide us with other material to which, if available, resort might appropriately be had in determining the nature of an alleged invention, and the

validity and scope of the patent claims founded upon it.

These statements strongly suggest that the Government has the right to attack the validity of a patent in an antitrust proceeding.

The precise question now raised was considered by Judge Westenhaver in *United States v. Porcelain Appliance Corp.* (N. D. Ohio, E. Div., Sept. 9, 1926). In an unreported opinion he stated:

Obviously, this is not a suit by the United States to cancel patents. It is probably beyond the scope of all possible issues to decree certain patents or certain claims thereof to be void. The issue here is whether or not the defendants have organized and are members of an illegal conspiracy and a final decree can probably not have any broader scope. These expressions are not to be taken as the final determination of any such question. However, assuming they correctly state the law, it would still appear that the allegations of the bill are proper and that the testimony in support thereof might be received * * * I can perceive many combinations, in violations of the Sherman antitrust law, in which patents or claims thereof, invalid in view of prior art, or limited in nature, may be wrongfully used in building up or maintaining such an illegal conspiracy * * *

As a consequence of the trial court's ruling the Government, of course, was not permitted to introduce evidence for the purpose of showing the invalidity of the "principal" patents upon which appellees now rely to justify their price fixing.* However, evidence introduced for other purposes does in fact show the invalidity of the article claims of the Roos "foam" patents. We submit that it would be consonant with the position which this Court took in *Slawson v. Grand Street R. R. Co.*, *supra*, now to examine this evidence of invalidity and pass upon the validity of these patents.

The principal ground of invalidity to be urged is that Roos does not describe a new or novel article or product. Claim 10 of the third Roos patent, which may be regarded as typical of the article claims of this patent, reads upon wall-board, which of course is old, and then goes on to say "having a porous body comprising a hardened cementitious material enclosing a plurality of voids encased in tough pliable films" (R. 114). We have already demonstrated in some detail that this claim does not describe a new or novel article (*supra*, pp. 229-230, 237-239). It is evident, therefore, that insofar as the Roos invention is based simply on the making of a "porous" or "cellular" wallboard, his claims are void. It is further submitted that the words of the claim "enclosing

* The Utzman and starch patents have expired.

a plurality of voids encased in tough pliable films" add nothing to the claim.²⁸ A porous or cellular board naturally would enclose a plurality of voids. If there is a distinction, the claim is wholly devoid of language to make the distinction clear and precise. So far as appears cells are voids and voids are cells. There is nothing, moreover, to indicate the size of the "voids", their shape or arrangement, or even their number, except as they are said to constitute a "plurality."²⁹ Only the final words of the claim—"encased in tough pliable films"—have a semblance of novelty about them. But these words constitute a misdescription of the finished product; they refer to the board in course of manufacture when the foam made up of "tough pliable films" is incorporated into the wet gypsum slurry. When the gypsum hardens or sets the bubbles have served their purpose. Then, as is admitted in the specifications, "the tough film envelope of the confined air or gas aggregate is replaced * * *" (R. 110). In other words, the bubbles evaporate in the drying process and leave merely a porous or cellular product which is old in the art.

²⁸ Claims expressed in terms so general and vague as these have uniformly been held to invalidate a patent. The public is given no means whatever by which to identify the patented product. *General Electric Co. v. Wabash Appliance Corp.*, 304 U. S. 364; *United Carbon Co. v. Binney Co.*, 317 U. S. 228. The further phrase, "tough pliable films", is equally meaningless. When are films "tough" or "pliable"? The article claims are accordingly void not only for lack of novelty but because not expressed in clear and precise terms.

The remaining article claims of this patent are likewise void and for the same reasons. The article claims of the first two Roos patents (Nos. 2,017,022 and 2,079,338) need not be considered, since they do not read upon a wallboard but merely upon an intermediate product, a cementitious material, which can be used in the manufacture of products of many types and descriptions.

We submit that to prevent appellees from "fasten[ing] upon the public * * * the burden of an agreement in violation of the Sherman Act" (*Sola Electric Co. v. Jefferson Electric Co.*, 317 U. S. 173, 177), this Court should now hold that the Government may show the invalidity of appellees' patents and should also hold on the present record that the article claims of the Roos "foam" patents are invalid.

CONCLUSION

For the reasons set forth herein it is respectfully submitted that the judgment of the court below should be reversed.

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